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Double effect reasoning intention in action

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Double Effect Reasoning: Intention in Action

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Abstract

Is there a morally significant difference between a terror bomber and a tactical bomber if they cause the same number of deaths? If so, what is the basis for that distinction? Double Effect Reasoning (DER) provides an account of the conditions under which an action that causes harmful effects is permissible (the examples usually involve death), even if the bad effect would *prima facie* fall under a prohibition (such as the prohibition on murder). One of the four conditions of traditional versions of DER is the claim is that an agent's intentions can be morally determinative, and provide a way to draw intuitively attractive moral distinctions between cases. This thesis offers a critical analysis of the role intention plays in DER.

There is a long history of double effect type reasoning, and in Chapter 2 I argue that it goes back at least as far as St Augustine, but not quite as far as Aristotle. After considering the central cases and traditional formulation of DER along with its history in the first two chapters, this thesis examines disputes over the role of intention in DER. In Chapter 3 I make the case that the philosophy of action, and in particular the way intention is understood in relation to action, is more important to the interpretation of DER than previously acknowledged. If the formation of an intention is an action and an instance of agency, then there are better prospects for intention to have some sort of fundamental moral significance. In Chapter 4 I consider T.M. Scanlon's influential view that intention has only derivative or secondary

moral significance, and drawing on chapter 3 I argue *pace* Scanlon that intentions can and should be taken into account when deciding what to do. Chapter 5 addresses another difficult puzzle for proponents of DER, the ‘problem of closeness’, which arises because a very fine grained description of what an agent actually intends counter-intuitively appears to allow agents not to intend harmful effects, even effects that are very close to what they do intend. E.g. a terror bomber who only intended to make the civilians appear to be dead is not obviously captured by DER’s intention condition. I argue that solutions to closeness that rely on coarser grained accounts of intention are difficult to sustain, but that we should move beyond a narrow focus on deliberate killing to include other ‘close’ prohibitions. Finally in chapter 6 I consider the application of DER, as developed in previous chapters, to the law. I argue that, in spite of philosophical debate, DER is not too conceptually complex or confused to be applied in that context.

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I have not found it easy to balance research with the demands of full time work, parenthood, and all the other things that life throws at you. This has meant that – even with good intentions - I have not been the best student over the last couple of years. I am extremely grateful for the guidance that Thomas Pink and my other supervisors at Kings have been able to provide.

Finally, I am most grateful to my family. My parents, whose encouragement to pursue a career in what I find most interesting has led me to this thesis, and to work in the field of ethics and policy. My wife Siobhan's kind patience, understanding and unfailing support has meant that I have a thesis to submit. Our marriage and our children have not known a time free from me needing to disappear to work on this thesis. I dedicate it to James Machin. R.I.P.

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Chapter 1. Introducing Double Effect

§1.1 Introducing double effect

The project developed here concerns double effect reasoning (DER). This theory is often presented as a way to solve problems in normative ethics, such as whether, faced with a prohibition on killing, it is permissible to prescribe pain medication that hastens death. Dealing with the permissibility of actions that involve outcomes that are both good and bad, DER provides four conditions (under the most usual formulations) which are individually necessary and jointly sufficient to render an action permissible. The standard case used to illustrate this is the terror/tactical bomber example. DER is invoked to explain why, all other things being equal, it is intuitively plausible that the tactical bombing of an enemy munitions factory is permissible, even if a schoolchildren nearby are killed as a side effect, and on the other hand, that it would not be permissible for a terror bomber to bomb the same area with the intention of harming the school children. The difference is explained in terms of the agent's intentions: the bad effects of an otherwise good (or neutral) action may not be intended as an end or a means, and there must be a proportionate reason (or set of reasons) for causing the harmful side effects.

§1.2 A Working Formulation.

There is substantial consensus on what DER involves when it is understood as a way to interpret and apply moral prohibitions, and at this stage it will help to outline the four standard conditions. DER is most often, and for the purposes of finding a ‘working formulation’ for this thesis, formulated as comprising four conditions which if fulfilled will make an action morally permissible even though it has evil effects (that would be prohibited if intended). The conditions are individually necessary and only jointly sufficient for the permissibility of the considered action:

- 1) That the action in itself from its very object be good or at least indifferent;
- 2) That the good effect and not the evil effect be intended;
- 3) That the good effect be not produced by means of the evil effect;
- 4) That there be a (or set of) proportionately grave reason(s) for permitting the evil effect.¹

It is important to note that DER does not recommend or determine that a particular action should be performed; meeting the conditions does not justify the action under consideration since other factors such as the opportunity cost of doing nothing, or something else entirely are not in scope. The conditions should be understood as having a veto power over the

¹ Mangan, J. “An Historical Analysis of the Principle of Double Effect” *Theological Studies* 10 (1949) p43.

permissibility of the action in question, and this does not imply that the action is justified. The principle invoked in this way of understanding DER and permissibility is that “something is good by reason of being good in every respect, bad from being bad in any”². An agent could be faced with many permissible actions, some of which are better than others; an agent might reasonably opt for the better of two permissible actions in this case, but DER does not provide this kind of guidance about the relative merits of permissible actions. DER underdetermines the all things considered best course of action to take, but does fulfill the more modest role, it is claimed here, of determining permissibility.

The first condition of DER, that the act itself be good or indifferent, prohibits one considering DER in relation to the potential good and bad effects of an already impermissible action. Below I consider the permissibility of tactical bombing, but if the pilot were fighting an unjust war, then any bombing would be impermissible. Torturing might have good and bad effects that fit the criteria of DER, but torture itself is wrongful so its further effects cannot render it permissible even if they fit DER criteria.

The second condition is the focus of this thesis and a key part of DER. If intentions are to be relevant in the way DER suggests, further philosophical work is needed: How should intentions be understood? Why and how do they have moral significance? Can the right kind of distinction be drawn

² Anscombe, G.E.M. Action, Intention and Double Effect in Geach, M. and Gormally, L. (eds.) *Human Life, Action and Ethics: Essays by G.E.M. Anscombe* (Exeter, Imprint Academic, 2005) p213.

between intention and foresight? These questions will be considered in chapters 3 and 4, but our starting point here is an agent's practical reasoning about what they are doing or plan to do. When we deliberate about actions, we have ends in mind. If we intend an end then we have a practically orientated pro-attitude towards achieving that end. In acting on an intention, I may deliberate about and adopt the means that I believe would be effective in order to realise my goal. Controversy surrounding the third condition concerning the means is related to disputes over the second intention condition, since means and ends are similarly chosen or adopted in being intended. There are, however, special problems here. How can we identify what counts as the means to an end? These questions about intending ends and means will be considered in Chapters 3, 4, and 5.

The fourth proportionality condition can be understood in (at least) two ways, and this receives attention in chapter 6. Firstly and perhaps most straight forwardly, it requires that the good outcomes must outweigh the bad outcomes. Even though the prospect of this kind of balancing good and bad is fraught with problems, examples in the literature are couched in a way to circumvent issues about the calculus and commensurability of the good and bad³. Grisez however points to an alternative interpretation of this condition: "One may not use a possibly deadly drug if a safer one is available and will do"⁴. Thus he interprets proportionality as concerned with

³ This is a significant theoretical problem that is difficult for all theories of evaluating action, not just DER.

⁴ Grisez G.G. "Toward a Consistent Natural Law Ethics of Killing" in *The American Journal of Jurisprudence* vol 66 1970 p78.

minimising harm rather than merely making sure it is outweighed by the good. Incidentally, I think this is what was meant by St Thomas Aquinas (See Chapter 2) in part of the passage that is usually attributed with being the first instance of DER: “Wherefore if a man, in self- defence, uses more than necessary violence; it will be unlawful”⁵. It will be noted that this interpretation appears to be in direct contradiction to the claim that DER permits rather than justifies. If the proportionality condition, interpreted in this way, means that one should act in the best possible way, then this refutes my claim that DER does not attempt to justify action, since the best possible permissible action is, by definition most likely to be justified (presuming there is such a thing as a justified action).

This argument is based on a simple error. The fourth condition, interpreted in line with Grisez, should be understood to mean that out of the possible actions, (permissible or impermissible) we should be testing the one with the least evil involved for permissibility. This is entirely distinct from the claim that DER pronounces on the relative merits of two (or many) permissible actions. The second claim is a strong claim that implies justification, and the first, a weaker claim that underdetermines justification, but as previously stated, when accompanied by the other conditions, provides sufficient grounds for permissibility.

⁵ Aquinas, T. Summa Theologica II-II Q.64 art. 7 “Is it lawful to kill a man in self defence?” on [<http://www.newadvent.org/summa/3064.htm>].

Before considering how these abstractions apply to real life or thought experiment situations, there is a problem here that will be conspicuous to most analytical philosophers, and that is the use of the term 'evil'. Since the DE originated in discussions of moral theology, this usage is not inappropriate; however it does have meta-ethical implications that some philosophers may be hostile to. 'Evil' as used above does not imply or need to have any direct relation to the contemporary debate concerning evil character. I distinguish evil-ness from evil effects; what DER provides is an account of whether and in what circumstances knowing an evil effect will occur from one's actions affects the character of the act and thus whether the proposed plan may be enacted. In the a-symmetrical cases (the 'body parts' and 'beggar' examples examined below) both scenarios involve the same evil effects, but one (according to DER) would be an example of evilness and the other would not. That is, one turns out to be permissible and the other prohibited. I don't believe that the meaning relevant to DER is maintained if 'harmful effect' is substituted for 'evil effect' since it doesn't capture the extent to which proponents of DER would avoid participating in evil, even as a means to a very good end. Perhaps an explanation more amenable to contemporary ethical discussion would have 'evil effect' replaced by 'effect which if intended is a violation of an absolute moral prohibition'. This is cumbersome and could be inserted where I use 'evil' and 'bad' effect. Fortunately the examples found in the literature (and this

thesis) focus on effects that are widely considered to be both evil, bad, and if done deliberately, subject to moral (and legal) prohibition⁶.

§1.3 Examples/Cases

Case studies in the double effect literature are used widely both to illustrate DER and to tease out conceptual problems. They do so in a number of disputed areas; concerning a morally relevant difference between intending and foreseeing (there are examples for and against); in the explanation of how DER might apply to cases; and in testing what feature of the case is doing moral work. Frances Kamm mentions two kinds of distinctions made by the literature; examples (and arguments) that distinguish between intending bad from foreseeing bad and those that distinguish intending good from foreseeing bad⁷. These are different kinds of distinctions and both are important to DER⁸. The first distinction would establish that intention is important and morally relevant whereas the second is both more controversial and central to DER in that it would establish that it is possible to foresee bad will occur while at the same time intending good. The plane and prisoner examples more clearly attempt to establish the first distinction and the rest the second kind.

⁶ I am reluctant to use the terms “evil effect” and “doctrine” of double effect since DER is also available to secular moral absolutists such as many deontologists. The most commonly cited absolute prohibition is the prohibition against murder, and I put aside questions of judicial killing, and permissible intentional killing in a just war in order to focus on the analysis of DER.

⁷ Kamm, F. *Intricate Ethics* (Oxford, OUP, 2007) p128 n.50.

⁸ Kamm makes the point that the second claim is a more accurate description of the double effect distinction, and I agree, but the first distinction is also important.

The Plane example

Anthony Kenny describes a situation where a pilot steers a stricken plane towards a particular suburb⁹. In one case he steers towards the suburb in order to minimise the loss of life from the crashing plane and in the second case “he takes the course he does because the suburb is where his wife’s lover lives and he is anxious, when he leaves this life, to take this obnoxious person with him.”¹⁰ There seems to be a clear moral difference between these cases, and DER supports this through the second condition.

The Prisoner example

A prisoner, suffering torture at the hands of his captors might foresee, even with certainty, that maintaining discretion (if information is the issue) and not yielding will eventually lead to his death. Only with a morally relevant distinction between intention and foresight, can this perseverance be evaluated as anything other than suicidal¹¹? I believe it is clear in this example that one might intentionally refuse to yield while merely foreseeing death as an unintended side effect. The prisoner will have to accept death, but to do this while intending a separate good end does not mean death is intended nor does it mean that death would be considered as a means to avoid yielding. It would be unacceptable to consider this prisoner suicidal,

⁹ Kenny, A. “The Principle of Double Effect” in his *Essays on the Aristotelian Tradition* (Oxford, OUP, 2001) Chapter 3. (Previously published as “Philippa Foot and Double Effect”) 18

¹⁰ Kenny, A *The Principle* p55.

¹¹ This argument, of course, is based on the premise that suicide is wrong.

and this lends weight to maintaining the separability of intention and foresight in certain and highly probable outcomes.

The Body Parts and Beggar examples

There seems to be an important difference and asymmetry between the following (the body parts example); A doctor chooses, rather than giving a full dose to save one patient, to split what remains of a scarce drug to save five patients; and the second scenario where a doctor chooses to kill (through act or omission) one patient in order to use their body parts to save five other patients. Foot offers a more nuanced version (the beggar example): she identifies a difference between not giving food to a beggar for the reason that resources are scarce and others are in need, and when he dies using his body for medical research; and not giving food to a beggar in order for him to die so we can use his body for medical research. This example contrasts using an available body for research against making a body available for research through neglect. This significant difference is not explained by a difference in the consequences or proportionality because they are the same. In the body parts example, the difference might be explained through a difference between doing and allowing, where it is permissible to allow a patient to die, but not permissible to kill a patient. The beggar example on the other hand cannot be explained using this method since in both cases the death is allowed to occur. The difference between the intuitively permissible and impermissible parts of the beggar

example is to be found in the reasons for allowing death, or in other words, the intention with which the agent acts.

Double Effect Reasoning applied to both the body parts and the beggar example renders the second part of the cases impermissible and the first permissible. In the second parts the death of the patient (or beggar) is used as a means to achieve the good end of saving the five (or providing for medial research) and so violates the third condition¹². The first (permissible) parts of the examples involve no suspect intent, no bad means and the proportionality condition is satisfied.

Palliative Care – a doubtful example

A very common example in accounts of DER is in palliative care. This case will be examined in more detail in Ch6, but the general details are important as a very common example of DER. In clinical situations of terminal care when managing extreme pain, DER offers clinicians a fine distinction between the (permissible) so called terminal sedation and (impermissible) euthanasia through sedative medication. Morphine used to relieve pain depresses breathing and can hasten death, so obviously only in severe situations would such steps be necessary. It seems intuitively plausible that

¹²Further, on a sophisticated understanding of intention considered below a link between the second and third conditions is highlighted. The means, if bad, is not just excluded because of the third condition but also by the second, which includes means as intended within the plan of the agent. The argument will run along the lines that one can't side step the impermissibility by claiming the death of the patient/beggar is a mere means, since using something as a means entails that one intends it.

two doctors with the same patient before them might prescribe the same titration of morphine, one with the permissible intention to relieve pain, while merely foreseeing the hastening of death, the other with the intention of hastening death (perhaps with the side effect of pain relief!). This example however, even though it is used extensively as almost a paradigm case of DER in philosophical literature, is not up to date with current best practice in palliative care¹³. In fact, quite the opposite effects are achieved by prescribing morphine in the right dosage. During terminal stages of life correct morphine use actually helps patients live longer, since the effects on a patient's airways have been more accurately controlled to help rather than hinder their breathing. I think that particularly in this area of applied ethics and casuistry, using an outdated example could be more damaging and misleading than we might imagine. If philosophers are not to be dismissed by the professions that would have a use for the principles they debate, care is needed to make sure that not just the principles, but the examples are relevant to current practice. Having said this, the right kind of situation (for double effect to be relevant) may still arise for doctors in emergency situations so the example should not be totally discarded by philosophers.

The Bomber examples

¹³ This example is arguably misleading since it is not up to date with current best practice in palliative care. See Ch6 and Fohr, S, A. Double Effect and Pain Medication: Separating myth from reality *Journal of Palliative Medicine* 1998; 1: 315-328.

Double Effect also famously distinguishes between a Strategic Bomber and a Terror Bomber, and this is one of the clearest applications. Two bombing missions might drop their bombs in the same place, but when one aims/intends to disable a military target with the side effect of harming innocents nearby and the other bombs that place precisely because it will harm innocents nearby a distinction is widely held to be intuitively evident. This example presumes that the pilots are engaged in fighting a just war, since in an unjust war any act of bombing would be wrong, and would be rendered impermissible by the first condition which states that the action of bombing must itself be good or neutral. Interestingly, the concept of a just war itself is very likely to make use of DER, since going to war certainly has bad effects that are foreseen, not intended.

§1.4 Some initial clarifications

The reason I prefer to call it Double Effect *Reasoning*, and do not follow much of the literature in referring to the ‘principle’ of double effect, is that there are a number of conditions involved and it is potentially misleading to imply that it involves just one claim¹⁴. Furthermore, there are a number of related versions of DER in the literature, many of which boil down DER to one or two principles, or add others, such as Daniel Sulmasy’s reformulation, which extends to 19 conditions and sub-conditions¹⁵.

¹⁴ Thomas A Cavanaugh, *Double Effect Reasoning* (Oxford: OUP, 2006).

¹⁵ Sulmasy, D.P. “‘Reinventing’ *The Rule of Double Effect*” in Steinbock, B. *The Oxford Handbook of Bioethics* (Oxford, OUP, 2007).

Running through these versions, and through the history of DER is the claim that intention¹⁶ is and can be morally relevant. Thus, it is fair to say that double effect rests on a key distinction between what is intended and what is merely foreseen. This distinction is certainly central, and much of this thesis is devoted to unpacking the theoretical context needed for intention to play the role DER requires of it. However, to see this as *the* foundation (and possible candidate for a singular 'principle') as the only nuance that DER offers or tool that DER uses, is misleading. DER is occasionally formulated along these lines, without reference to any other conditions; for example, as the claim that "it is sometimes permissible to bring about as a merely foreseen side effect a harmful event that it would be impermissible to bring about intentionally"¹⁷.

This formulation, while certainly a good explanation of the relevant distinction and thus the function of DER in some examples, cannot account for the full range of cases, some of which are only accounted for by the other conditions. Side-lining one or more conditions in the interests of a concise

¹⁶ It is important to distinguish between "doing X with the intention to Y" from "intentional Y-ing", or as Anscombe introduces the distinction, between "Intentional Action" and "intention-with-which". The intention with which an action is performed refers to an agent's deliberation and the reason(s) for and against a particular course of action. "Intentional Action" seeks to identify the broader set of purposive actions, and for Anscombe these are actions for which a special sense of the question "Why?" is applicable. This broader category includes actions that are not of primary relevance to double effect, such as instinctive responses, and even actions that are intentional but that are done for "no reason" (see Anscombe, GEM. *Intention* Section 16-18). So, the question "Why?" is relevant to a broader class of actions than those which are done with an intention (as in "doing X with the intention to Y"), and the latter are the actions and intentions that are crucial for DER.

¹⁷ McIntyre, A. "Doctrine of Double Effect" Stanford Encyclopaedia of Philosophy. (<http://plato.stanford.edu/entries/double-effect/>)

explanation (and even then only an explanation in some cases) can lead to confusion and tendency to emphasise problems that arise when applying DER. For example, a case that satisfies the intention requirement, where the good effect is intended and the bad merely foreseen might still fall foul of the fourth proportionality condition of DER.

Formulations that focus exclusively on intention might, however, indicate that DER is being understood in a non-traditional way. Though DER's origin is in a tradition that deploys absolute moral prohibitions, its core insight has also been used in non-absolutist contexts. Rather than determining permissibility, this approach to DER finds that harmful intended outcomes are harder to justify than harmful foreseen outcomes. There are some theoretical differences to note here. While the version of DER that is tied to prohibitions involves intentions in a way that is morally decisive (because DER is used to apply prohibitions), the non-traditional use of the intend/foresee distinction treats intention as a worsening factor that might tip the balance against acting. This thesis focuses on the traditional way of understanding DER as relating to prohibitions, rather seeing intention as a potentially worsening factor that might render an action impermissible. It may well be possible to reconcile these versions of DER, but given the even greater variety of positions in the philosophy of action and meta-ethics that one could hold alongside the non-traditional formulation, that is a task for another project.

§1.5 The Structure of the Thesis.

The history of DER is interesting, and the subject of Chapter 2. In it I consider whether some early case based discussion found in the writings of St Thomas Aquinas and Aristotle are good examples of DER. DER is usually traced back to St Thomas' account of the permissibility of killing in self-defence, and I argue that his writing contains the ingredients for DER, but deploys them in a somewhat inchoate way. Recent discussion of Aristotle on 'Mixed Action' is also of interest, due to the diversity in how Aristotle has been interpreted. Pakaluk takes Aristotle to provide an early example of DER, whereas DiNucci finds the cases under discussion to provide convincing counter-examples to DER. I argue that Aristotle does not deploy (an early version of) DER, but that his consideration of mixed action is compatible with DER. Finally, I argue that DER can be traced further back than St Thomas, to St Augustine, and develop the thought that Augustine's theodicy (if slightly exotic in philosophical terms) is an early example of DER.

DER is paradigmatically a non-consequentialist kind of reasoning, because central to DER are the ideas that bringing about certain bad effects intentionally would be impermissible even if overall consequences are beneficial, and that bad outcomes may not be used as a means to further good ends. It is not the case that all non-consequentialists embrace DER. Indeed, some of the most prominent critics of DER, including J.J.Thomson and T.M.Scanlon, are deontologists. For many non-consequentialists this

kind of principle is intuitively very plausible, however, not only does it face challenges concerning its coherence, clarity and usefulness, but DER also raises a number of deep and significant puzzles in normative ethics, the philosophy of action and moral psychology.

One of the wider questions, or sets of puzzles raised by DER concerns the moral significance of intention. Intention is important because it is a special kind of attitude that is connected to our appraisal of actions and agents. From our earliest stages of development we are used to using the fact that something happened 'by accident' or 'involuntarily' as an excuse when we are blamed. These cases are examples of not having an intention and where this is exculpatory. They are not, however, examples of what Anscombe might call 'human actions', because the effect occurs involuntarily. The question for DER is whether the absence of an intention in relation to a bad outcome can be exculpatory, or render the action permissible, when that outcome is caused voluntarily, with foresight and as the result of an action that has been the subject of deliberation.

Intention and moral character are thought to be closely related, since by deliberately being charitable, for example, we might become a charitable person, and someone who has charitable virtues is the kind of person who tends to give to charity deliberately and on purpose. On the other hand, what may be driving objections to double effect is the fact that when we deliberate about what to do in moral situations, we think about the object of deliberation, that is, what to do and perhaps the reasons for and against

acting in that situation. We do not think about whether we ought to intend or merely foresee particular outcomes.

Anscombe makes a closely related point, that intention is not an extra feature of an action: "We do not add anything attaching to the action at the time it is done by describing it as intentional...The question does not normally arise whether a man's proceedings are intentional; hence it is often 'odd' to call them so."¹⁸ This feature of intention is very strange if intention is supposed to be morally relevant and even central to our analysis of the permissibility of actions, as is claimed by DER. For intention to be so crucial at one level, but not even considered in situations where double effect would normally apply, begs the question about whether double effect reasoning is really doing any moral work at all.

There are three possible ways to proceed in the face of the concern that we do not typically deliberate about intentions. Firstly one might reject double effect outright, in consequentialist fashion, thinking that it depends on "a distinction without a difference"¹⁹ and that outcomes are what matters in coming to ethical conclusions. The second possibility is to try to account for the intuitive plausibility of double effect reasoning without giving intention the prominent role it usually takes. T.M. Scanlon takes this line in *Moral Dimensions: Permissibility, Meaning, Blame*²⁰. The third option is to develop

¹⁸ Anscombe, G.E.M. *Intention* (Harvard University Press, 2000) §19 pp28-30.

¹⁹ Glover, J. *Causing Death and Saving Lives* 1979 p88.

²⁰ Scanlon, T.M. *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge, Mass, Belknap Press, 2010).

an account that explains how intentions are actions, subject to obligations in the way required by DER and at the same time not ordinarily the object of deliberation. I develop and defend this account *pace* Scanlon and others in Chapters 3 and 4.

Chapter 3 highlights two schools of action theoretical thought that I argue are helpful here, in particular the differences that are generated due to their position on whether intention formation is an action, or whether it is the (passive, non-voluntary) cause of action. DER depends on and is deeply connected to this kind of question in the philosophy of action, but this is normally in the background.

In considering Scanlon's views in Chapter 4, a number of key issues emerge which deserve further consideration. One of the challenges that Scanlon levels at DER is that there are features *other than intention* which more fundamentally explain the permissibility of actions. He argues that "the intention is wrongful because the act intended is wrongful, and the act is wrongful because of its likely consequences, not (fundamentally) because of the intention"²¹. On this model, intention is morally relevant only derivatively, in the way it affects character and as a predictor for behaviour. It is not foundational in what makes something wrong in the first place.

²¹ Scanlon, T *Moral Dimensions* (Cambridge, Mass. Harvard University Press, 2008) p29.

According to Scanlon, the distinction between the deliberative and critical use of principles matches up to the difference between permissibility and fault. The more foundational concept, permissibility, relates to “those features of our situation that we *should* take as counting for or against an action”²². Following Scanlon’s contractualism then, “both permissibility and fault are determined by the principles that we can ask each other to use in deciding what to do. An act is permissible if it would be licensed by these principles, and an agent is at fault when these principles are used critically to evaluate an agent’s action”²³.

I argue that Scanlon’s account does not establish that intentions can only have derivative moral significance. Other people (such as our friends) have interests not only in our voluntary actions that affect them, but also in the attitudes which motivate, explain and with which we carry out those actions. I provide an account of the way we might deliberate about intention that avoids on the one hand the thought that we can look inward and direct our intention away from impermissible parts of our plan (a view Anscombe described as a travesty of the doctrine of double effect), and on the other, the view that the non-voluntariness of intention means that we cannot deliberate about or take intentions into account when deciding what to do.

Another persistent problem for DER in the literature concerns the ‘means condition’ and how it should be interpreted. The intended aspects of a plan

²² Scanlon, p50 my emphasis.

²³ Scanlon, p49.

and the means used might appear to be separable, particularly as there is a separate condition in DER concerning the means, but this may prove to be problematical if the central feature of DER is that intentions matter, because if plans are to be effective, one needs to choose a means to accomplish it. This relationship between intention and the means is not straightforward. Shelly Kagan's discussion of 'weak' and 'strong' means conditions²⁴ differentiates between including the means that are deliberately chosen on the one hand and the causal chain that is actually employed in achieving the end on the other. The tactical bomber pilot will cause some wear and tear to his aircraft as a means to bomb the factory in the strong version, but not in the other; if asked about this he might reasonably deny that he deliberately chose to diminish the flying capability of his aircraft in any way! This kind of problem is brought into sharper focus where it is unclear whether a morally problematical effect (of an otherwise good action with other good intended outcomes) ought to count as a means, as intended, and therefore ruled out by DER. There are deep challenges to DER arising from the question of what ought to count as intended, and what fixes those things which an agent intends when they act to achieve an end.

Chapter 5 addresses this kind of puzzle for proponents of DER, the 'problem of closeness', which arises because a very fine grained description of what an agent actually intends counter-intuitively appears to allow agents, via a slight of hand, not to intend harmful effects, even effects that are very close

²⁴ Kagan, S. *The Limits of Morality* p141ff.

to what they do intend. A terror bomber might (not only claim, but actually) intend only to make the civilians appear to be dead by exploding his bomb, and an assassin might claim that all they intended was to scratch their index finger on the trigger of the gun. In these cases we are tempted to think that the agent is being disingenuous, or that the deaths actually feature as part of the further ends motivating them to act. In what I take to be an important test case for closeness, this is not the case.

The craniotomy case involves a tragic situation where during labor the baby's head becomes stuck ('obstructed labour') and risks the life of both the mother and child. This problem can be averted by caesarian section but historically (and perhaps in some places with little or no midwifery provision) this real case presents a difficult dilemma, because in doing nothing both mother and child will likely die, and the only apparent solution is to crush the skull/narrow the dimensions of the head of the baby in order to remove it from the birth canal. Here, we can safely assume that the doctor does not secretly desire the death of the child, as we were tempted to say in the terror bomber and assassin cases. Is it possible for the doctor to intend to crush the head without intending its death? I argue that solutions to closeness that rely on coarser grained accounts of intention that might tie the crushing to the death in some way (so that we can say that the doctor, in crushing, will intend the death of the child) are difficult to sustain. I suggest that a more satisfactory solution does not seek to distort the first-personal practical reasoning account of intention, and appeals to 'close' prohibitions instead, such as a prohibition on lethal targeting (of innocents).

The final chapter (6) considers the application of double effect to decisions at the end of life, and in particular it reviews the way English law has had a mixed approach to DER in end-of-life cases. In this chapter I note that the discussion of DER has been dominated (at least in the philosophical literature), by hard cases and philosophical problems, and argue that this may have made lawyers too dismissive of DER. If DER is broadly true, then it applies right across our acting lives, from difficult life and death decisions, to mundane acts like buying a coffee. It would be wrong to exploit workers in the coffee supply chain, and though my purchase is made in the knowledge that some exploitation is extremely likely, it is not intended. It is hard to find actions that don't have some harmful consequences, indeed Joseph Boyle has argued that all voluntary action involves DER, because we need to account for the opportunity cost of what we do. By choosing to pursue one good end, I fail to pursue another, and this failure is a bad side effect that is permitted through DER. We do not need to take a decisive view on the pervasiveness of DER in our moral lives to see that DER is and can be applied in the law, and the final chapter does so in relation to disputed cases in end of life care and recklessness.

Chapter 2 The tradition of double effect reasoning.

(Exodus 22:2): "If a thief be found breaking into a house or undermining it, and be wounded so as to die; he that slew him shall not be guilty of blood."

§2.1 Historical sources of DER

The task in this chapter is not to provide an authoritative historical account of the origins of DER²⁵. It is, rather, to consider the plausibility of some of the attributions of DER to Aquinas and more recently to Aristotle . To what extent do these authors show or argue for double effect reasoning as we know it today, involving or approximating the four conditions (outlined in Ch1) leading to a judgment of permissibility? After arguing that Aquinas presents a plausible origin for DER, and that Aristotle's account of mixed actions is not a plausible origin (but is compatible with DER), I present a further example that I have not seen recognised in the literature; that Augustine's theodicy and account of evil presents all of the elements of DER, and should be seen as an early origin (albeit slightly removed from normative ethics).

²⁵ See e.g. Cavanaugh, *Double Effect Reasoning*., Joseph T Mangan, "An Historical Analysis Of The Principle of Double Effect," *Theological Studies* 10 (1944). Christopher Kaczor, "Double-Effect Reasoning from Jean Pierre Gury to Peter Knauer," *Theological Studies* 59, no. 2 (1998): 297–316, doi:10.1177/004056399805900206.

One might think that the task of finding examples of DER type positions would not be very difficult, since with enough leeway in how DER ought to be interpreted, any mention of the significance of intention in relation to ethics might count as an early example. Peter Abelard's intentionalism²⁶ is an early (12th century) example that focuses moral evaluation radically on intentions, in that it is an agent's intention alone that determines the moral worth of an action. This position may be related to DER, but goes very far beyond it. A proponent of DER need only claim that intentions are sometimes morally decisive, rather than being always the only proper subject of moral evaluation.

We should not think that every self-proclaimed case of double effect reasoning is in fact a good example of the theory. There is reason to think that Peter Knauer's reinterpretation of double effect has more in common with consequentialism than the contemporary version of Double Effect outlined in Ch1. For Knauer interprets intention not in terms of one's practical reasoning (ends and means), but in terms of what one has a proportionate reason to favour²⁷. "If there is a commensurate reason for the permitting or causing of the evil, the means is effectively willed only in its good aspect. The effect or, more exactly, the aspect which is physically evil, remains morally outside of what is intended"²⁸. I will not dwell on this

²⁶ See e.g. http://individual.utoronto.ca/pking/articles/Abelard_on_Ethics.pdf accessed June 2016

²⁷ See Knauer, P. (1979), 'The Hermeneutical Function of the Principle of Double Effect', in C. E. Curran and R. A. McCormick (eds.), *Readings in Moral Theology, i: Moral Norms and the Catholic Tradition* (New York: Paulist Press), 1–39. See also Kaczor, C. *Proportionalism and the Natural Law Tradition* for a robust critique of Knauer and the 'proportionalist' school.

²⁸ Knauer, P. (1979), 'The Hermeneutical Function of the Principle of Double Effect' p20.

version that collapses DER into the fourth proportionality condition. Since here we are considering early examples that may exemplify the standard conception of DER, principally from St Thomas, Aristotle, including a recent dispute over whether Aristotle's 'mixed actions' are a good example of double effect type reasoning, and St Augustine, where I argue that elements in his thought exemplify very well the conceptual moves made by DER.

§2.2 St Thomas Aquinas

Joseph Mangan authored the most often cited history of DER²⁹, tracing the historical beginning of DER as a formulated principle to his discussion of whether killing in self defence is permissible. This is not to say that four conditions are clearly articulated in the passage in questions (reproduced below), but that the spirit and elements of DER are there, and can be filled in with details from St Thomas' other writings (e.g. *Summa Theologica* I – II, Q20, A1).

Under a question on murder, St Thomas considers whether it may be permissible for a private individual to kill in self defence. He accepts that public authorities may kill to preserve the common good e.g in just war, but is now considering in general whether without explicit public authority one may cause death. St Thomas suggests that a private individual may cause the death of the attacker, but only where the effect of an assailant's death is

²⁹ Mangan, "An Historical Analysis Of The Principle of Double Effect."

judged to be *praeter intentionem* (beside or outside the intention) of the defender who uses lethal force:

Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention. Now moral acts take their species according to what is intended, and not according to what is beside the intention, since this is accidental as explained above (II-II:43:3; I-II:12:1). Accordingly the act of self-defence may have two effects, one is the saving of one's life, the other is the slaying of the aggressor. Therefore this act, since one's intention is to save one's own life, is not unlawful, seeing that it is natural to everything to keep itself in "being," as far as possible. ³⁰

The literary style of the *Summa* involves St Thomas citing and considering sources that fall on both sides of the answer to the question under consideration. In this case, St Thomas does not have as his target writers who take it that that one may intend to kill the attacker. This passage is set against the background of St Augustine, who thinks lethal self defence is impermissible, interestingly not because it would be an instance of or tantamount to murder, but because one's own life ought not to be valued over that of the assailant's³¹. St Thomas takes the view that one is primarily responsible for the protection of one's own life over that of another.

³⁰ Aquinas, St Thomas, *Summa Theologica* tr. Fathers of the English Dominican Province 1920: henceforth abbreviated: ST IIa IIae Q64 A7.

³¹ ST IIa IIae Q64, A7, Objection 2.

The fact that St Thomas did not provide a precise formulation of a set of conditions has caused some to think that it would be a mistake to believe DER (as we encounter it today) as originating with St Thomas. First of all, though Aquinas' account in Q64 A7 does not spell out whether the death of the assailant may be intended as a means to saving one's life, or whether it must not be intended as an end or as a means. Alonso SJ, for example, writing in 1937³² sees a discontinuity between St Thomas' account and more familiar scholastic four-condition formulations, since he understood St Thomas to assert that one may intend the death of the aggressor as a means, but not as an end. Mangan argues convincingly that St Thomas is committed to the view that means are intended as 'proximate ends', or 'intermediary ends' from his discussion earlier in the *Summa* of more general principles of action³³ and therefore cannot be *praeter intentionem*. He would therefore be committed to the means condition.³⁴ The ingredients, then, are all present in St Thomas, and in their application to self-defence.

One further notable query over whether modern forms of DER are to be traced to St Thomas comes from Elizabeth Anscombe, who believes that a different passage in the *Summa* shows St Thomas' general opinion on responsibility for the evil consequences of actions, and that cannot easily be squared with DER:

³² quoted in Mangan, "An Historical Analysis Of The Principle of Double Effect."

³³ See ST Ia IIae, q.12, a. 2c; q. 1, a. 3, ad 3.

³⁴ Interestingly some interpreters of St Thomas argue that the means condition cannot be found in St Thomas' treatment. See Mangan, "An Historical Analysis Of The Principle of Double Effect." P46, citing Vincentius M. Alonso S.J. *El principio del doble efecto en los comentadores de Santo Tomas de Aquino* Romae, 1937).

“If [the effect] is preconceived, it manifestly adds to the goodness or badness of the action. For when someone considers that much that is bad can follow from what he does, and does not give it up on that account, this shows that his will is the more inordinate” (Ia, IIae, Q.20 art.5)³⁵

This appears to show that a foreseen evil effect, even one falling outside one’s intention, can show that one’s will is inordinate. It may be possible to argue that this is compatible with DER, since one is still responsible for the bad effects caused by an action DER renders permissible, and that the quote from Aquinas above is an expression of the proportionality condition, in which the agent is supposed to consider both foreseen and intended effects. Nonetheless, the connection Aquinas makes here between foreseen evil consequences and ‘inordinate will’ is not obviously compatible with the moral implications of the intend/foresee distinction that DER relies upon.

On the basis of this, Anscombe argues that DER ought to be understood in a more restricted sense (as ‘the principle of the side effect’), specifically that “the prohibition on murder does not cover *all* bringing about of deaths which are not intended”³⁶. As opposed to a view that DER’s conditions can provide a reliable guide to permissibility for causing death in general. On

³⁵ Quoted in G. E. M. Anscombe, “Action, Intention, and Double Effect,” in *The Doctrine of Double Effect: Philosophers Debate a Controversial Principle.*, ed. P.A. Woodward (Notre Dame Press, 2001), p65.

³⁶ G. E. M. Anscombe, “Action, Intention, and Double Effect,” in *The Doctrine of Double Effect: Philosophers Debate a Controversial Principle.*, ed. P.A. Woodward (Notre Dame Press, 2001), p61.

Anscombe's more modest formulation, an action that causes death may still be bad, or even impermissible, but not in respect of the prohibition on murder if the relevant effect is *praeter intentionem*. I consider this and related positions in more detail in my chapter on closeness below.

So, there is good reason to think that double effect is closely tied to particular moral prohibitions, and that Aquinas is the source of the modern discussion around double effect. There is enough in St Thomas' writings to support the claim that DER is present, though may in places be "inchoate" or implicit³⁷. In the next section I consider whether the conceptual ingredients for Double Effect also present earlier.

§2.3 Aristotle

Two authors have recently attempted to trace DER's origin further back than St Thomas, to Aristotle. On the face of it, St Thomas was instrumental in incorporating insights from Aristotle's works into the Christian theological tradition, so there is a plausible story to be told in terms of the intellectual tradition here.

Pakaluk (2011) makes a favourable comparison between Aristotle's discussion of 'mixed actions' in the *Nicomachean Ethics*. Though Aristotle is considering differences in the action in terms of the 'voluntary' (*hekousion*)

³⁷ Cavanaugh, *Double Effect Reasoning*. p15.

and 'involuntary' (*akousion*), an interesting dispute has arisen as to whether as Pakaluk claims, mixed actions should count as good early examples of DER type thinking, or whether they are not good examples and rather point the way to substantial criticism that may be levelled at DER. The key passage is the following:

“Some things are done because of the fear of greater evils or because of the hope of some good. Thus a tyrant, having in his power the parents or children of a certain man, commands him to do a disgraceful deed on condition that they will be spared if he does it but killed if he does not do it. Here a doubt arises whether his actions are voluntary or involuntary. A similar case is found in the decision to throw goods overboard during storms at sea. Absolutely speaking, no man would do so voluntarily, but if it means that his life and that of others are saved as a result, a sensible man will do it. Operations of this kind are mixed. However they approach more closely to voluntary action for they are voluntary at the time they are done, and the end of action conforms to this particular time.” (1110a4-11;388-389)³⁸

So Aristotle's view is that considered in the particular circumstances, the actions are voluntary (they do not arise from violence or from ignorance (see 1109a35 – 1110a1;386). In support of the view that this exemplifies

³⁸ Thomas Aquinas, C. I. Litzinger, and Ralph McInerny, *Commentary on Aristotle's Nicomachean Ethics* (Dumb Ox Books, 1993). p127.

double effect type reasoning, Pakaluk writes that “ These [Aristotle’s cases] are akin to cases in which one would naturally wish to bring in [DER]: in throwing cargo into the sea—which is itself neither immoral nor unlawful—one both saves the ship and incurs a monetary loss”.³⁹

DiNucci argues that Aristotle’s mixed actions produce “countless counterexamples to [DER] by generating cases where the bad means...is not even remotely morally comparable to the good effect (such as saving the crew). And the problem for double effect is that it would not allow for such cases of marginally bad means.”⁴⁰ The example he provides is where the captain is considering whether to jettison a cargo of mobile phones in a storm in order to save the lives of the crew.

Though both DiNucci and Pakaluk consider throwing the goods overboard to be intuitively permissible, Pakaluk takes this to be a case of DER, and DiNucci takes it to be a hard case that calls the means condition into question. If the former, then Aristotle’s mixed actions could more plausibly be read as a precursor to DER.

It is not clear to me that we should agree that the ‘bad means’ on DiNucci’s reading of this case should be prohibited by DER. True, jettisoning the cargo is the means one adopts to secure the aim of saving the crew, but it would be a mistake to read DER as prohibiting any harmful means at all. Amputation

³⁹ Michael Pakaluk, “Mixed Actions and Double Effect,” in *Moral Psychology and Human Action in Aristotle*, ed. M. Pakaluk and Giles Pearson (OUP, 2011).

⁴⁰ Ezio DiNucci, *Ethics Without Intention* (London: Bloomsbury Academic, 2014). p60.

of a gangrenous limb is typically *defended* on the grounds of double effect, even though some harm is done as a means to save the life of the patient (some portion of not-yet-infected limb is amputated). On standard readings, the harmful means relates to the *prima facie* prohibited effect that may not be used as a means to achieve the good effect. When DER is applied in a non-absolutist way, or by an absolutist in relation to non-absolutely prohibited harms, the verdict the various conditions supply is not one of permissibility, but that actions are *harder to justify* if the harm is intended compared to cases where the harm is merely foreseen. In this sense, compared to the case described, it would be harder to justify jettisoning the cargo if the captain were taking advantage of the storm to harm the business interests of the cargo owner.

So, if DiNucci's "objection from marginally bad means" includes means that might fall under an absolute prohibition, then his objection is just a restatement of the consequentialist critique of DER. If the means on the other hand does not fall under an absolute prohibition, then his objection loses force because the harmful means is merely harder to justify under DER, and jettisoning the cargo is an example where even this harder-to-justify means is in fact permissible, because lives will be saved.

I would suggest, then, that there are some similarities with examples that are often found in the DER literature. However, Aristotle's discussion does not relate directly to the I/F distinction and is not an early example of double effect *reasoning*. What is mixed in Aristotle's account are voluntary

and involuntary aspects of action, whereas the distinction that makes a difference for DER is between intended and foreseen good effects, both of which are caused voluntarily. The examples Aristotle raises are typical of the DER literature, and the established criteria map onto them well, but there does not appear to be enough evidence that the *solution* Aristotle envisages to account for these cases is much like DER. The Philosopher makes the point that these are cases of voluntary action – in the sense that they are not coerced.

I would, though, *pace* DiNucci, say that Aristotle's treatment of those two cases is compatible and consistent with DER. The tyrant example is important here. DiNucci suggests that the disgraceful deed could be a security official passing secret information to the enemy tyrant. He asks "can we say that, when the security official passes the relevant information to the enemy, he does not intend to do so and that passing information to the enemy is not a means to save his family?"⁴¹. DiNucci is searching for a way for DER to render passing information to the enemy to be permissible, which he argues is the "most natural reading of Aristotle"⁴², and he argues that we are bound to see passing information as the means to save the family.

It seems that we are *ex hypothesi* bound to see the passing of information to the enemy as the means used in order to save the family, however neither

⁴¹ Ibid. p48

⁴² Ibid. p55

Aristotle nor a standard reading of DER would necessarily concur with the thought that this is a case where *permissibility* is to be found and explained. In the very next section of the *Nicomachean Ethics*, when considering the *merit* of voluntary actions, The Philosopher writes that:

“Some actions do not deserve praise but only pardon, for example, if a person does things that are wrong because he fears evils beyond human endurance which no one would undergo in any case. Yet it is probable that there are some actions that a man cannot be forced to do and he ought to undergo death of the cruellest kind rather than to do them” (1110a19-26)⁴³

So the voluntariness (or not) does not determine an act’s permissibility, and while the act would be voluntary in the circumstances, it is probable that there are actions that are so disgraceful as not to be permitted. The further point to notice is that in this case, the harmful effect of one’s family suffering would fall under DER criteria, if the act is so disgraceful, one’s intention to preserve integrity (in refusing to comply with the tyrant’s demands), would have terrible foreseen side effects that are not intended as a means nor as an end in themselves.

⁴³ Aquinas, Litzinger, and McInerney, *Commentary on Aristotle’s Nicomachean Ethics*. p131

§2.4 St Augustine

We have seen that St Thomas is a very plausible origin for DER, and that while Aristotle's passage on mixed action does not exemplify DER type reasoning, he considers relevant cases in relation to voluntariness in a way that is compatible with DER. Finally, I will argue that approaches to theodicy, in particular St Augustine's early account of evil and God's creative power and will, share many of the features of DER. That is, how an agent can remain good even though he causes evil to occur, and knows (with certainty) about this upshot of his action.

In a passage at the beginning of a work in which he considers the problem of evil, Augustine writes the following: "Those who ponder these matters [i.e. the problem of evil] are seemingly forced to believe either that Divine Providence does not reach to these outer limits of things or that surely all evils are committed by the will of God. Both horns of this dilemma are impious, but particularly the latter"⁴⁴.

Here we have a structural similarity with DER type reasoning. One finds both good and bad effects in the world that God created. The combination of God's goodness, omnipotence and omniscience create the classic problem for theologians like Augustine: how and why evil exists in the world given those attributes.

⁴⁴ St Augustine, *De Ordine (On Order)*, ed. S Borrusso (South Bend, Indiana, 2007). Section 1.1.1

Fergusson summarises Augustine's approach to solving this dilemma:

"Augustine's solution to this problem is three-pronged: (1) he holds that evil is a privation and cannot be properly said to exist at all; (2) he argues that the apparent imperfection of any part of creation disappears in light of the perfection of the whole; and 3) he argues that the origin of moral evil, together with that suffering which is construed as punishment for sin, is to be found in the free choice of the will of rational creatures."⁴⁵

The double effect type move is in (1); involving a privation account of evil, and in (3), where the origin of evil is traced to free choice found in the will of rational creatures.

The privation account suggests that everything of substance is created and therefore willed by God. However, evil as a privation or parasitic on the good, is not substantial so was and is not willed by God. This approach resembles double effect because the world has mixed effects – both good and evil, God's activity is wholly good (*ex hypothesi*), and He is omniscient (that is, He has perfect foresight). The double effect-type move here is to say that both divine providence and God's foreknowledge do reach the 'outer limits of things', so that evil is foreseen as a side effect of the free will of rational creatures. It is not intended or willed by God.

⁴⁵ Fergusson, W. *Beyond the Problem of Evil* [<http://faculty.georgetown.edu/jod/augustine/ferg>] accessed April 2016

There is a long Platonic history of understanding evil to be a privation, or parasitic on the good (see e.g. Proclus), but with Augustine's theodicy, we have an agent, God, who wills, whose will is *ex-hypothesi* entirely good, and who is omniscient, and this context is what gives rise to double effect type reasoning.

Though the privation account has the character of DER, it is most useful if one believes that God intends everything He creates or causes to exist. This is not necessarily the case, and if it is not, could we still have a double effect based theodicy in Augustine?

We could, and this has its basis in the third of Augustine's approaches to theodicy as identified by Fergusson. In this approach, the origin of moral evil is in the free choice found in the will of rational creatures. If the will is free to choose independently of God's will, then this introduces an element into creation that God foresees, causes, but does not intend (or determine). Moral evil comes into the world as a foreseen but side effect of the creation of free will.

This is far from a thorough exegesis of St Augustine, and there may well be earlier Christian neo-platonists who have similar theoretical commitments in relation to privation and others who use free will to account for evil. Also, drawing out this kind of early example of double effect reasoning may be of limited application: it is not obvious what we can learn from Augustine's

solution to the problem of evil. Some legal scholars⁴⁶ have traced the concept of *mens rea* back to St Augustine (354 – 430 AD). *Mens rea* is the mental element of a crime, the ‘guilty mind’, involving intention or knowledge, and most crimes require proof of (or a jury to believe that) *mens rea* is present. Augustine writes in relation to perjury that: “[r]eam linguam non facit nisi mens rea,” “[p]erjury does not exist absent the mental element” (Augustine, Sermones, No. 180, c.2., Migne, Patrol. Vol. 38, col. 974). In other words, simply saying something under oath that is false does not constitute perjury; one must also intend, thereby, to deceive those to whom one speaks.”⁴⁷

While it may be tempting to read into this an understanding of intention and permissibility of the kind DER deploys, that would be too hasty. *Mens rea* is used in an exculpatory way, in that absence of a *mens rea* is considered to reduce the severity of the crime, and therefore punishment. It is not just an absence of mental element that can excuse, but both recklessness and negligence are considered to be lower forms of *mens rea*. So, there is more work to do if we are to situate normative (rather than theological) double effect type reasoning in St Augustine’s thought.

⁴⁶ Pollock, F and Maitland, F. *The History of English Law Before the Time of Edward I* (Cambridge, CUP, 1952) quoted in Thomas A Cavanaugh, “Abuses of Double Effect, Anscombe’s Principle of Side Effects, and A (Sound) Account of Duplex Effectus Recommended Citation,” *Philosophy Paper* 51, 2015.

⁴⁷ Ibid. n52

So to conclude this section, we have given some consideration to the origins of double effect, and that DER is rooted in traditions that recognise absolute moral prohibitions. Recent scholarship that has traced DER back to Aristotle is interesting, but neither provides an early example of double effect, nor a robust challenge to DER in the 'marginally bad means' argument. Finally, Augustine's thought displays many of the ingredients of DER, but in theological, rather than normative application.

Chapter 3 Intention in Action and Double Effect

A man can form an intention which he then does nothing to carry out, either because he is prevented or because he changes his mind; but the intention itself can be complete, although it remains a purely interior thing. All this conspires to make us think that if we want to know a man's intentions it is into the content of his mind, and only into these, that we must enquire, and hence, that if we wish to understand what intention is, we must be investigating something whose existence is purely in the sphere of the mind; and that although intention issues in actions, and the way this happens also presents interesting questions, still what physically takes place, i.e. what a man actually does, is the very last thing we need to consider in our enquiry. Whereas I wish to say it is the first." (Anscombe 1957 p9)

§3.1 Actions and Intentions

As we have seen, DER is not a simple philosophical conundrum, nor solution to a clearly articulated problem. It makes normative claims based on a distinction in the moral psychology of action (intend/foresee), on the normative relevance of instrumental rationality, and on the importance of considering outcomes holistically (proportionality).

It should not be surprising that debates in the philosophy of action have an impact on normative theory, though the links between them are not often clearly spelled out, nor are implications drawn out for Double Effect Reasoning⁴⁸. Double effect is in a particularly good position to be affected by disputes over action as it stands between the fields of action, normative ethics, meta-ethics and moral psychology. In what follows, I draw some implications for double effect of the differences between Anscombe and Davidson's account of action and intention⁴⁹, and consider some fundamental differences in different accounts of action. The chapter below is not an attempt to try to derive a contribution to normative theory from the understanding of actions⁵⁰, but to highlight how different understandings of action can have a particularly important effect on how DER is understood.

If, for example, we think of an action as an event caused in the right kind of way by a mental state, then this may lend support to or tend to favour an event based interpretation of normative aspects of double effect reasoning, over and against other theories of action that involve closer connections between the content of mental states and the nature of action. Nancy Davis has for example contrasted 'event' and 'agent' interpretations of the means condition⁵¹. She argues that the literature on DER has suffered from confusion over how the means condition ought to be understood, and this

⁴⁸ Though there are some rare exceptions see e.g. Daniel P. Sulmasy, "'Reinventing' the Rule of Double Effect," in *The Oxford Handbook of Bioethics*, 2009, 1–41, doi:10.1093/oxfordhb/9780199562411.003.0006.

⁴⁹ See Anscombe *Intention*, Davidson "Actions Reasons and Causes" and "Agency", both in *Essays on Actions and Events*. Hornsby "Actions in their Circumstances"

⁵⁰ See Nussbaum, the Constitution of Agency and Enoch, Agency, Schmagency.

⁵¹ Davis, N. "The Doctrine of Double Effect: Problems of Interpretation" in Woodward *The Principle of Double Effect* p129.

seems right, but more on this later (Ch5). My approach in this chapter is not to suggest that action theory favours a particular interpretation of DER, rather I aim to make the claim that action theoretical commitments, and in particular the relationship between intention and action stand to affect the general plausibility of DER.

Holton presents a challenge to the methodology often used in DER that is not only worth addressing in its own right, but also because it points the way towards the importance of the theory of action in the debate around DER. He writes:

“The standard move in trying to assess [DER] is to take apparently identical actions, and then to vary the intention with which they are performed: the actor does the same thing, but with different intent. Then a judgement is made about whether the two cases differ in their permissibility. The defender of the doctrine says sometimes the permissibility does differ; the opponent, says that it does not. My contention [is] that this approach is methodologically flawed. If actions are to be characterised in intentional terms, holding the action fixed whilst varying the intention is not in general possible.”⁵²

In essence his view is that it is not possible to strip intentional action concepts down into a non-intentional verb and an intention that may or may not be present.

⁵² Richard Holton, “We Don’t Torture : Moral Resolutions , Temptation , and the Doctrine of Double Effect,” *Journal of the British Academy* 5 (2017): 309–29.

This echoes nicely a question posed by Wittgenstein and which is often seen as the beginning of modern philosophy of action:

“When ‘I raise my arm’, my arm goes up. And the problem arises: what is left over if I subtract the fact that my arm goes up from the fact that I raise my arm?”⁵³

While Wittgenstein was making a point about the difference between a mere happening and an action, both Wittgenstein’s question and Holton’s paragraph taken together show that there are important distinctions to be drawn in the philosophy of action that have the potential to cash out in terms of different approaches to normative ethics, particularly when we seek to address hard cases that test our intuitions. I am sympathetic to the view that intentional action cannot be reduced to the intention and a non-intentional act or event, and I explore this further below since the difference between a reductionist and non-reductionist approach to intentional action will, I argue, play a role in explaining some of the differences between supporters and critics of double effect reasoning.

Holton’s characterisation of the DER literature as involving the same actions with different intentions is however contestable, and misleading. As we saw in Ch1, the example pairings typically involve the same *effects* and different intentions. It is a further leap to say that they involve the same actions and

⁵³ Ludwig Wittgenstein, *Philosophical Investigations*, Trans. G.E (Oxford: Basil Blackwell, 1953), doi:10.2307/2217461. §621

different intentions, so I am not convinced that Holton's methodological complaint applies in general. If DER is taken to be an exploration of the application of absolute moral prohibitions, then it is in the business of determining what kind of action took place on the basis of the various conditions – was it a murder or a killing? It is open to the defender of DER to agree with Holton that the pairs of cases do not involve the same action.⁵⁴

Indeed, there is a significant strand in the DER literature that argues precisely this. Joseph Boyle argues that an act's moral kind is determined by the agent's intention⁵⁵, John Finnis that "what is being done...is settled by what one chooses under the description that made it attractive to choice"⁵⁶ and these can be traced to accounts of action, including Aquinas' (and others in the scholastic tradition) in which actions are morally specified ("receive their species") according to what is intended, and not according to what falls outside what is intended (*praeter intentionem*)⁵⁷. This is not to say that

⁵⁴ This thesis considers both types of action, and action tokens, and a short note on this will be helpful. Much of the debate around DER proceeds on the basis of casuistry; considering the moral intuitions we have when faced with particular action tokens, which may either be thought experiments or particular acts. On the other hand, when we use DER deliberatively or prospectively, action types are under consideration: "if I were to act in this way and with this intention, it would fall under this action description". This difference explains my argument above. I do not dwell on the distinction in this thesis, but note that others have seen a type/token mistake in some critiques of DER. See for example FitzPatrick, W. "Acts, intentions and moral permissibility: in defence of the doctrine of double effect." *Analysis* 63.4, October 2003, pp217-21. As the argument in this thesis develops, it will be clear that both act types, and act tokens are under consideration, but DER's central and more theoretically important role (I suggest) is in relation to action types. The distinction does not pose any particular problem for the methodology or argument put forward in this thesis, but it is hoped that this clarification will help those looking at DER through the lens of the type/token distinction.

⁵⁵ Joseph M. Boyle, "Toward Understanding the Principle of Double Effect," *Ethics* 90, no. 4 (July 19, 1980): 527–38, doi:10.1086/292183.

⁵⁶ John Finnis, "Intention and Side Effects," in *Intention and Identity* (Oxford University Press, 2011), 173–96

⁵⁷ Aquinas, *ST I-II Questions 6-21* also Steven Jensen, *Good and Evil Actions: A Journey through St Thomas Aquinas* (Washington, DC: CUA Press, 2010).

intentions are always or the only morally relevant features of actions, but they are a “key part”⁵⁸.

But this is just to say that some proponents of DER would not agree with Holton’s characterisation of paired cases as involving the same *actions* plus or minus an intention. The cases may involve the same bodily movements, the same effects, but not necessarily the same actions.

In order to address Holton’s methodological point, I have suggested that we are not tied to thinking that the pairs of cases elicit judgments about the same actions (which each involve different intentions). We may be making judgments about permissibility on the basis that we interpret the pairs of cases to involve quite different actions because of their different intentions. Not just a difference between the intentions of two doctors who administer the same dose of morphine (to use an example that is now out of date by some 25 years⁵⁹), but that there is only one instance or act of euthanasia (there are two different types of act); to state the moral claim more starkly, one doctor murders and the other does not. A good example is an insulting gesture, where the intention quite obviously matters to our understanding and assessment of what is done. An insulting gesture is quite a different kind of thing to a gesture that causes insult, when it is done on purpose and

⁵⁸ Jean Porter, “Choice, Causality, and Relation,” *American Catholic Philosophical Quarterly* 89, no. 3 (2015): 479–504, doi:10.5840/acpq201561558. p495.

⁵⁹ See Ch 6 and Regnard, C. ‘Double Effect is Leading a Double Life.’ *BMJ*. 2007 Mar 3; 334(7591): 440. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1808133/> See also Morita T, Tsunoda J, Inoue S, Chihara S. Effects of high dose opioids and sedatives on survival in terminally ill cancer patients. *J Pain Symptom Manage* 2001;21:282-9 and Sykes, N. “The use of opioids and sedatives at the end of life” *The Lancet* Volume 4, No. 5, p312–318, May 2003

without apology. While both gestures might cause offence, only one was rude. We might think that this begs the question, but the possibility of this line of argument should mean that our case based approach is not irredeemable. The intention may be bound up in what is done, a part of the proper descriptions of the action.

What I want to bring to the fore in this chapter are some wider implications of the relationships between actions, effects and intentions, from the theory of action. Differences in accounts of action will, it is argued, play a role in the way we think about the normative elements involved in DER.

The view that the DER literature involves intention in a way that is separate and separable from our characterisation and understanding of action, which Holton suggests is implicit in the whole of the methodology around DER, may lead us to think that intentions have a secondary, merely derivative or indirect role in relation to action. If intentions are ‘merely derivative’ or indirectly related to action, they may not be able to play the kind of role that DER suggests when we consider the permissibility of actions, and a number of philosophers argue precisely this⁶⁰. On the other hand, if the formation of an intention is itself an action (and other people’s interests are affected by our attitudes towards them, such as the purposes for which we act) in a way that is directly rather than derivatively subject to obligations, then different

⁶⁰ See for example, Jonathan Bennett, *The Act Itself* (Oxford: Clarendon Press, 1995); Judith Jarvis Thomson, “Physician-Assisted Suicide: Two Moral Arguments,” *Ethics* 109, no. 3 (April 20, 1999): 497–518, doi:10.1086/233919; T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Harvard University Press, 2008); Judith Jarvis Thomson, “Self Defence,” *Philosophy and Public Affairs* 20, no. 4 (1991): 283–310.

models of action stand to affect the way we interpret DER and its plausibility as a way of determining the permissibility of acting in difficult cases.

§3.2 Bennett on Action and Double Effect

There is a straightforward way in which one's philosophy of action might affect one's approach to double effect. Jonathan Bennett, at one point, took the view that first order morality (what one may or may not do) does not address intentions on the basis of his action-theoretical understanding of intention. He writes that:

“My [view] was based on two truths: (1) What I intend in ϕ ing is defined by which of my beliefs and desires I am motivated by; and (2) I cannot turn beliefs or desires on and off at will. From these I inferred that (3) I cannot turn intentions on and off at will, which implies that (4) intentions are not under the command of first-order morality”⁶¹.

This is an example where a belief-desire model of intentional action is used to show that intentions (being made up of or ‘defined by’ beliefs and desires) are passive, not voluntary and therefore cannot be commanded by moral rules. This is easily read as a position incompatible with Double Effect Reasoning. Bennett, however, while going on to challenge DER,

⁶¹ Bennett, *The Act Itself*. p195

acknowledges that the inference from (1) and (2) to (3) is not correct. He writes: “Although it does not make sense to forbid me to believe P and want Q, it does make sense to forbid me to act on this belief and desire.” So, Bennett lands at a position more sympathetic to there being a role for intentions, albeit “limited in scope and indirect in effect”.

A more plausible role of intention in double effect, then, is not as something separate from the act that can be turned off and on, but rather as a non-voluntary act of will part of a proper explanation of what is done voluntarily and these further actions (or tryings etc.) are what DER’s judgment of im/missibility relates to.

Perhaps we should not be as quick as Bennett, and others in this tradition of thinking about action motivation, to dismiss the possibility of intention as a non-voluntary element in trying/acting with an intention. Peter Geach articulates this well “it seems absurd that intention should steal upon one unawares, like a fit of anger or fear. On the other hand, how can there be voluntary acts of intending? If an act is voluntary, one may be ordered or advised to do it; but as Wittgenstein pointed out, the verb ‘to intend’ has no useable imperative, one cannot use such an imperative to order or ask or advise someone to intend something”⁶²

⁶² Peter Geach, “Intention, Freedom and Predictability,” *Royal Institute of Philosophy Supplement* 46 (March 12, 2000): 73, doi:10.1017/S1358246100010389.

Geach contrasts the proper view of intention with that which some take to be an intention, namely “saying in one’s heart something like ‘I’m going to do so-and-so’”. This approach to intention has the advantage that it is voluntary, and so more clearly within the scope of moral appraisal. It raises, however, more problems that it promises to solve.

The ‘little speech’ approach is not appropriate for DER because, as Anscombe⁶³ and others have pointed out, it is vulnerable to “sophistical” abuse. An agent may ‘direct his intention’ away from harmful parts of his plan, restricting it only to beneficial outcomes. Thus an agent may say (to themselves) that they are merely firing bullets in order (say) to hear their report, and do not intend the death of a rival through whom the bullet passes. “‘Nonsense’ we want to say, ‘doing that is doing this [murdering your rival] and so closely that you can’t pretend only the first gives you a description under which the act is intentional’. For an act does not merely have many descriptions, under some of which it is indeed not intentional: it has several under which it is intentional, so you cannot choose just one of these, and claim to have excluded others by that.”⁶⁴

When an agent is deciding what to do in the cases found in DER literature, we would find it odd (to say the least) if they were deliberating about which intention with which to cause their desired outcomes. The bomber pilot in *Enola Gay* (the first aircraft to drop an atomic bomb), who having chosen to

⁶³ Anscombe, “Action, Intention, and Double Effect.”

⁶⁴ Ibid.

kill civilians decides only to intend that they appear dead after the atom bomb detonates, is performing a kind of mental gymnastics that Anscombe calls the 'gerrymandering' of intention. Gerrymandering is a problem for DER, since it promises to provide a 'get out of gaol free' solution to deliberating agents, and this serves as a *reductio* for those who wish, as proponents of DER do, that intention can be determinative in relation to permissibility. If intentions can be gerrymandered, then they couldn't possibly play the role DER needs them to.

If DER is to be credible, it ought not to be able to provide agents with this kind of 'get out of gaol free' possibility. There is also at least the threat of regress here; if intention is a voluntary inner act of speech, it seems reasonable to ask with what intention the little speech was made.

By way of diagnosis, Geach suggests that there is often a confusion between an intention (properly understood), and *trying*, or *setting oneself*. "One may intend to try to do something; but hardly, try to intend to do it", since this would be 'absurd'.

So what does the difference between intention viewed as voluntary or not mean for DER? If the verb 'to intend' has no useable imperative because intentions are non-voluntary, what then are we to make of the intention condition of DER? This is particularly pressing given the implausibility of and challenges associated with the position that intentions are voluntary. A possible way forward is not to view intentions themselves in isolation as

wrong-making features of actions, but to see them (when present) as part and parcel of what is done. Resisting the view of human action as sub-class of events that have an associated intention.

Bennett's view is influenced here by a constellation of positions, including 'the standard view' of action, which while being 'standard' and influential, are at the same time widely criticised. This standard view can be traced to a number of sources including Hobbes, Hume, and more recently Donald Davidson among others. This view is, very broadly, that actions are explained by beliefs and desires (pro-attitudes). These rationalise what I do, and this rationalisation is a species of causal explanation. Motivations have a central role here and practical rationality is (merely) instrumental on this view⁶⁵, because it serves to secure the object of desire: "for a desire and a belief to explain an action in the right way, they must cause it in the right way, perhaps through a chain or process of reasoning that meets standards of rationality"⁶⁶. Desire (or desire like pro-attitudes) motivate us to pursue an end, combined with beliefs that our action will further the end. The goal directedness or purposiveness of an action comes about because the action is an effect of the expression of attitudes (beliefs and desires).

§3.3 Davidson and Anscombe

⁶⁵ Candace A. Vogler, *Reasonably Vicious* (Harvard University Press, 2002).

⁶⁶ Donald Davidson, *Essays on Action and Events* (Oxford: OUP, 1980). Essay 12, p232.

Actions can be described truthfully in many ways, and each way will say something different about what is done, some of these might have moral implications, others will appear innocent. Both Davidson and Anscombe take it to be possible for one action to fall under different descriptions, some of which are intentional and some are not. For an action to be intentional, there must be at least one description under which it is chosen/adopted by the agent. One and the same action or event might be described variously as ‘pouring liquid’, ‘making a drink’, ‘quenching the thirst of the victim’ and ‘administering poison’.

However, there is an interesting tradition of contrasting Anscombe and Davidson’s approach to action that I explore below⁶⁷. Davidson and Anscombe are not normally contrasted, and Hornsby cautions that the details of their disagreement are not clearly to be found in the authors’ primary sources, because she argues, they did not appreciate the depth of disagreement between them. However, it may turn out that their approach to agency and actions are “utterly different”⁶⁸.

Where Davidson’s view of action is broadly that actions are events caused in the right kind of way by mental states (including beliefs, desires etc.), Anscombe presents a challenge to the standard view expressed by Davidson along these lines: An action’s various properties (to which its various

⁶⁷ See for example, Julia Annas, “Davidson and Anscombe on ‘the Same Action’,” *Mind* 85: 251–57, doi:10.2307/2253123; Jennifer Hornsby, “Actions in Their Circumstances,” in *Essays on Anscombe’s “Intention,”* ed. A Ford, J Hornsby, and F Stoutland (Cambridge, MA, 2011), 105–27.

⁶⁸ Hornsby, “Actions in Their Circumstances.” p105.

descriptions are owed) “do not have their source in the workings of event-causality, but in the means/end structure of pieces of practical reasoning.”⁶⁹

Anscombe’s striking denial that actions are intentional in virtue of some “extra feature” that distinguishes them from unintentional actions or mere events, is aimed at positions like Davidson’s where I have acted if my desire (that I have ice-cream) motivates and causes a change in the world. The alternative Anscombian view is “to call [an action] intentional is to assign it to the class of intentional actions and so to indicate that we should consider the question ‘Why?’ relevant to it.”⁷⁰§19. This is the class of actions for which the content of an agent’s practical reasoning is relevant to proper understanding, correct descriptions and explanations.

This denial of an ‘extra feature’ that distinguishes actions from events is not to deny that there are psychological events, nor even that these may cause actions⁷¹. What Anscombe does deny is that a reason for an action is necessarily this kind of event. “In particular, ‘intention’ does not refer to a mental event (or state) which precedes or accompanies an intentional act and makes it intentional; there may be mental events which immediately precede intentional actions but there need not be”⁷²

⁶⁹ Hornsby p118.

⁷⁰ G. E. M. Anscombe, *Intention* (Cambridge, MA: Harvard University Press, 1963).

⁷¹ Ibid. See §11.

⁷² Rosalind Hursthouse, “Intention,” in *Logic, Cause and Action*, ed. Roger Teichmann (Cambridge: CUP, 2000).

The descriptions of an action that an agent must admit are those that feature in his or her practical reasoning.

“Suppose we take a countable concept of an action or event like, say, administering poison. Such an event will split up into lots of sub-events or sub- actions; there might even be a gap in the process, which yet counts as one administration of poison – the administration being interrupted, say, by a fit of coughing on the part of the administrator. However we are willing to counter the whole episode as just *one* Time that the person administered poison, One administration.”⁷³

The conclusion that Hornsby draws is that there are radical differences between Anscombe and Davidson not just in relation to the cause of actions, but due to their understanding of action itself. She summarises these differences in terms of what has the ‘central place’ in our understanding of agency. For one it is the agent, for the other it is the event.⁷⁴

Where actions are compound, their components constitute the whole by virtue of the intention that unites them. The answer to the question why she is doing what she is doing (whisking eggs, say) can at any point be that she is doing the whole thing (making an omelette,

⁷³ G. E. M. Anscombe, “Under a Description,” *Noûs* 13, no. 2 (May 1979): 219, doi:10.2307/2214398.

⁷⁴ Hornsby, “Actions in Their Circumstances.” p125

say). There is then a sort of structure in 'by'-chains that makes no appearance in Davidson's account.⁷⁵

So, even though pouring liquid out of a vial is a true description of the action, it is part of a unity that is specified by the agent's intention to administer poison. "In Anscombe's treatment, when there is a compound action, the series of means the agent takes are united by reference to the agent's end, not by summing the several, separately conceived components of the action (still less to summing such bodily movements as those components might involve)."⁷⁶ For Anscombe, 'why' and 'how' questions will reveal the unity of 'administering poison'. The Davidsonian position is reflected in the latter approach, which gives events rather than agents the central place in agency. This difference of 'centrality' is clearly significant if it is read across into our interpretation of DER.

Davidson's error is to fail to take account of the way reason informs what people do as they go along, rather than just being in people before they do things, and causing them to act. Here we should be able to see that the framework with which actions are explained is quite different to that proposed by Anscombe. Reasons for acting feature as a cause, rather than in the proper explanation of ongoing action. As Vogler puts it:

"It is not that we have, on the one side, someone with a lot of things in mind, and on the other an event describable in indefinitely many

⁷⁵ Ibid.

⁷⁶ Ibid. p124.

ways, and now confront the onerous task of connecting mental representation to event. It is rather that some of the salient descriptions of what one has in mind will (if all goes well) line up with the salient descriptions of what one does. Representation of practical inferences, on Anscombe's reading, is partly a device for understanding intentional action, not by giving its cause, but by revealing its grounds, by showing "what good, what use, the action is"⁷⁷

There is a significant difference, then, between how Anscombe and Davidson see actions are correctly to be conceived: "a person's moving her fingers in a certain way may in some circumstances be her kneading the dough, in other circumstances her massaging someone's back. In such examples we find two actions between which Davidson would find no inherent difference, because (a) he would say that the events are of different kinds only insofar as they relate differently to other events, and (b) the bodily movements are of the same kind *ex hypothesi*."⁷⁸ Harking back to the criticism levelled by Holton at the methodology of DER, we can see how it might have purchase against the Davidsonian view in which there is no inherent difference between these two actions of 'a person's moving her fingers in a certain way'. Are they really best explained as the same action, done from different beliefs and desires, or are they different actions?

⁷⁷ Vogler, *Reasonably Vicious*. p221.

⁷⁸ Hornsby, "Actions in Their Circumstances."

For Davidson, Vogler suggests, the need to provide a special kind of explanatory causal story is motivated by a failure to attend to the rational structure *in* action. On Anscombe's view, acts that are derailed and then resumed do not present a problem of whether there was one act or two.

"In Davidson's view, events constitute a neutral, unconceptualised category. He thought of the domain as, so to speak, standing ready – ready for us to pick out this or that item belonging in it. That is how he could seek a criterion for things in the entire domain "for occurrences *just as such*" – as if the intrinsic nature of any event were a matter simply of its being an event, and independent of the nature of any other things"⁷⁹

This is at least very close to the view that intentions are something that can be added or taken away from the very same action, which, as we saw with Holton at the top of this chapter faces difficulties when applied to DER, since it is less well equipped to provide for differences in kind in the pairs of cases DER judges between.

It is worth considering whether the Davidsonian picture might be incompatible with DER, hostile to DER or neutral. If we view intention as the operative or primary cause of an act, then that can specify the descriptions

⁷⁹ Ibid. p116.

under which an agent intends to act, which should provide enough for DER's intention condition to operate. On this view DER prohibits particular kinds of outcome causation. However, there are reasons to be cautious here. Even if we grant that a causation based account provides the correct account of acting for a reason and intention, it is not at all clear that it can render meaningful differences between effects that are intended and those that are merely foreseen. Since foreseen effects are caused alongside intended effects, by the relevant motivating intention⁸⁰. On the other hand, if foreseen effects are not desired, but are believed to result from action, then this difference in desire could do the moral work. Another reason for caution comes from Jonathan Dancy, who has argued that the belief/desire model is "incompatible with moral realism", because what makes an action right in the normative sense is not the agent's psychological state, but some salient state of affairs in the world. So if causalism is right it would appear that we cannot act for a normatively good reason."⁸¹ Commitments to anti-realism in ethics and support for double effect would be difficult to square. However, it should be enough, for now, to make the necessary point that there are difficulties associated with the Davidsonian model of action that have bearing on DER.

My suggestion, then, is that there is a conceptual space opened up on the Davidsonian model which distances the mental element of an action from

⁸⁰ It would not be difficult to construct scenarios where the harmful side effect would not occur without the motivational cause.

⁸¹ For a useful discussion of Dancy's position see e.g. Stephen Boulter, "Aquinas on Action and Action Explanation," in *New Essays on the Explanation of Action*, ed. Constantine Sandis (Basingstoke: Palgrave Macmillan, 2009), <https://philpapers.org/rec/BOUAOA>.

events that follow from them. This will favour, or rather tend to support and provide a plausible theoretical background for a popular strand of criticism of DER that distinguishes between the relevance of DER in appraising an agent's character, on the basis of their state of mind, intentions etc. on the one hand, and in providing criteria for permissibility which do not directly involve these psychological pre-cursors on the other. Bennett, Thomson, and Scanlon run variations of this argument, arguing that intention and one's motivations are only indirectly relevant to permissibility (though directly relevant to the appraisal of character).

If this is the case, then it is worth noticing one feature of the debate around DER.

Separately to whether a Davidsonian picture of action favours the view that intentions have an indirect relevance to action, we might also worry that the way most of the cases which serve as examples of DER are set up in the literature⁸² may be hostile to an Anscombian understanding of intention in action. In the distinction between tactical and terror bomber, the morphine example⁸³ and many others, philosophers have found cases in which the outcomes and circumstances under question are identical or at least indistinguishable, and only the intentions are different. The search for examples with as few 'moving parts' as possible that motivates drawing up the examples in this way is a good way to tease out our intuitions about

⁸² That is, the familiar casuistical methodology of analysing pairs of cases (see my Introductory chapter for examples).

⁸³ See Chapter 6 for further discussion of this case.

particular concepts, in this case intention, because confounding factors are minimised.

However, this may create or increase the burden of proof on accounts that hold intentions to change the nature of the action, and therefore the way effects are characterised turns what are taken to be canonical DER examples into hard cases for the Anscombian view. These are hard cases because it can be hard to see why a change in mental state should cause a radical change in the permissibility of indistinguishable sets of events.

One charge that might be brought against this picture is that it does not delineate clearly enough between intention-with-which and intentional action. The central case of DER is where an agent can specify the intention-with-which they act – the goal that structures their means-end reasoning. The class of intentional actions, however, is broader than the standard way we consider DER cases – an agent deliberating about what it may be permissible to do or not. Intentional actions that are not typically considered in the DER literature include instances where there is no, or no obvious intention-with-which one acts e.g. habitual actions, actions done ‘in the heat of the moment’, or the special case of non-voluntary actions (like acts of will, see below).

I am reluctant to argue for or against the application of DER to the wider category of intentional action here, but I do note that if DER is to apply, it may need to be supplemented with other considerations. The permissibility

of intentional actions done from habit may depend in part on the background of how one has developed that habit (tried to avoid it through training etc), an evaluation of the habit itself, as well as the typical conditions of DER. It seems to me, however, that actions done out of habit and actions done in the heat of the moment sound more like reasons to excuse, rather than reasons to permit (reasons to think the act does not fall under a particular prohibition).

§3.4 Two Models of Action and the Indirect Relevance of Intention

Finally I want to draw out a way of understanding Anscombe's dispute with Davidson in terms of wider differences about agency and reasons in action. While we have considered some aspects of Davidson's model in detail, and linked it with a motivation based model of action, an alternative model of human action has its origins in the Scholastic tradition⁸⁴ and can be characterised as the 'practical reason-based' model of action⁸⁵.

Rather than construing human action as an effect of a desire or other motivating pro attitude, human action is the exercise of a distinctively practical capacity for rationality. On the one hand a complete account of an

⁸⁴ Thomas Pink "Intentions and two models of human action" in Bruno Verbeek (ed.), *Reasons and Intentions*. Ashgate (2007); Jensen, *Good and Evil Actions: A Journey through St Thomas Aquinas*; Thomas Pink "Suarez, Hobbes and the Scholastic Tradition in Action Theory" in Thomas Pink, M.W.F. Stone (eds.) *The Will and Human Action: From Antiquity to the Present Day*. London : Routledge, 2003.

⁸⁵ Pink, "Intentions and Two Models of Human Action."

action must include the agent's psychological states, but also, it must include the external 'desired object', that is, the object or state of affairs which the agent apprehends as good and subsequently has reason to pursue. An intention, on this view, is a distinctive kind of reason-applying attitude, rather than reducible to beliefs and desires. Intentions are a non voluntary act (of the will), they are an instance of agency, of self-determination because they are an exercise of our capacity practically to respond to reasons – the desirability of what is intended. Actions themselves, then (rather than just their causes) are defined by features in what McDowell might call "the realm of reasons". This makes it more likely that pairs of cases with the same effects could be understood as different kinds of actions.

The content of intentions – their objects, provide the goal at which an agent is directed when he acts. These brush strokes are far too broad, and in identifying these two schools of thought, there will necessarily be generalisations and blurry edges. There are however a few key differences I would draw out.

On one view, practical rationality is (merely) instrumental; all of one's reasons for acting express, engage, or otherwise involve one's desires; and desires, being non-voluntary, are not necessarily subjectable to rational criticism. On the other practical reason based view, the connection between intentions and action is not causal, but explained through the content of an agent's reasoning. Intentions are non-voluntary, but because they do involve

an exercise of our capacity to reason about practical goals etc, they are rationally appraisable.⁸⁶

“Suppose that I am deliberating about whether to stand up or stay sitting down, on the basis of considering what ends these actions might further, and conclude that I should get up. My deliberation has then left me, as Aquinas put it, commanding myself to get up – getting up hence counting as an *actus imperatus* or commanded action, which as based on beliefs about what ends its performance might further, is accordingly purposive. But there is also the prior action of deciding to get up an action which I haven’t been deliberating about, which has been explained instead simply by my deliberation about whether to get up, and so simply by my beliefs about what ends getting up would further, and which is, accordingly non-purposive. This action Aquinas regards as an *actus elicited*: an action which is elicited by my practical reason, rather than commanded by it. And so, for Aquinas, we have the possibility of deliberate will agency that is motivated in non-purposive form. What makes such decisions actions themselves, is the fact that they as much count as exercises of a distinctively practical rationality as do the actions decided upon which they explain.”⁸⁷

⁸⁶ Thomas Pink has a well developed account of this view in *Self Determination: the Ethics of Action* (Oxford, OUP, 2016).

⁸⁷ Thomas Pink, “Reason and Agency,” *Proceedings of the Aristotelian Society* 97 (1997): 263–80, doi:10.2307/4545265.

Having this kind of second order action, a decision or intention elicited from my practical reason on the basis of my understanding of the result of my action has the potential to explain the moral relevance of intention in DER, in a way that a Hobbesian/Davisonian account is not able to offer.

Conceptual space is created on the latter account. According to the Practical-Reason model, there is a non-voluntary act that explains further voluntary actions, tryings etc, but that is closely connected to the content of reasons as pro-attitudes, as opposed to the Davidsonian account, where what explains an action is the causal story of beliefs and motivating desires. An intention to A is itself a non-voluntary action, and is part of what is done voluntarily on the basis of the intention, rather than being explained in terms of causation on what McDowell (derisively) calls the “hydraulic” picture of rational motivation.

Following Anscombe, actions are to be understood to relate foundationally to the means-end structure of practical reasoning, intentions have motivational power but also have explanatory power not as causes of actions (e.g. a particular pro-attitude), but in virtue of their contents, the object of intention and the practical reasoning that is shaped by that goal⁸⁸. From the scholastic model of action, intentions are part of a special rational and practical capacity we have to respond to the desirability of goals.

⁸⁸ Cf. Michael. Bratman, *Intention, Plans, and Practical Reason* (Harvard University Press, 1987).

How can these differences in philosophy of action help navigate the DER literature? The main thrust of this chapter has been to show that an Anscombian action theory, and Scholastic practical reason based accounts of action and intention are more hospitable to the kind of distinction that DER draws, since intentions are more clearly linked to differences in kind (i.e. the kind of action undertaken), even where the third person view of the situation, i.e. our description of events abstracted from the practical rationality of means end reasoning that they contain, sees no (or only a limited) difference.

One long running and forceful set of arguments against double effect focus on intention, and the intuition that when it comes to permissibility, we ought to be looking outward, rather than inward to find an action's morally decisive features⁸⁹. We ought to be looking at the positive or negative characteristics of events in the world rather than an agent's state of mind. Judith Jarvis Thomson, and T M Scanlon, for example, have made the case that intentions (and states of mind) are relevant to assessing the character of agents, but that this is distinct from permissibility, properly understood. However, as we have seen above, a model of action that sees intention as part of a proper explanation of action – what is done, has less conceptual space for this type of distinction and a Davidsonian/Hobbesian account of action encourages the separation between character and permissibility judgments in relation to actions. An Anscombian or Scholastic model of

⁸⁹ Holton, R. "We Don't Torture: Moral Resolutions, Temptation and the Doctrine of Double Effect". *The Journal of the British Academy* Vol 5 (2017), pp309 – 329.

intention in action has the resources to hold both the psychological element and the rational, outcome/goal direction focussed elements of action together.

The connection between the Hobbesian motivation based model of action and Davidson's views can be seen in their view of motivation and causation. Hobbes writes that actions by their nature are expressions of prior passive motivations, and Davidson that an action is an event caused by a mental state (belief/desire)⁹⁰. The link between Anscombe and the scholastic tradition is found in her approach to practical reason. Anscombe wants to preserve the structure of reasons in action, and the practical reason based model of action is able to accommodate this because a decision or intention is the exercise of our capacity to respond to reasons in a practically orientated way. An account of action and agency that finds intentions to be actions (rather than pre-cursors to action) is much more hospitable to the thought that obligations can govern what one intends. We might go further to say that under this kind of theory of agency, the primary case of agency might be deciding what goals I aim at, and if obligations govern agency, then the position that I can be under obligations not to aim at certain goals, as in DER's intention condition, has a strong action theoretical basis.

This, of course, is too quick, but enough it is hoped, to establish that there are good reasons to think that one's philosophy of action is significant for

⁹⁰ See Thomas Pink, *Self-Determination : The Ethics of Action. Volume 1*, n.d. p228ff

the way we interpret intention's role in normative ethics, and DER's core claims. It suggests a deeper connection between DER and more general theories of agency and the significance of agency. A more full and systematic exploration of the links between Anscombe's approach to intention, scholastic action theory and DER would be fascinating, but beyond the scope of this thesis.

So to reprise the main parts of the chapter, intention is best understood as non-voluntary, but that this may challenge intentions' moral relevance if it is relevantly similar to beliefs and desires (for which we have at most indirect moral responsibility, depending on how we have chosen to affect our own desires etc.). This is not fatal to DER, because we can distinguish between two schools of thought in the philosophy of action, one of which includes an account of intentions that are non-voluntary and up to us/an action. On this model of action, we have a more plausible way of understanding how intentions can affect the kind of actions performed, even in circumstances where the effects are the same, and because intention formation is itself an action, we have an opening for obligation to apply to our attitudes. The reason our attitudes might be subject to obligations is considered in the next chapter, where I argue that others have interests in what our attitudes (such as intentions) are, as well as in the voluntary actions that result from them. We should, then, be wary of criticism of DER that is motivated by a view of intention as voluntary, of action as separate from the means-end structure of practical reasoning, and of intention as anything other than bound up in a

proper understanding of what is done, both through our motivation, and reason based explanation of what is done.

In showing how different models of action can affect the way DER is interpreted, and affect important elements in the theoretical background in which DER operates, I have taken a position contrary to Warren Quinn, who in his “Actions, Intentions, and Consequences: The Doctrine of Double Effect”, argues that “If [DER] is sound, its force ought to be capture-able on any plausible theory of the intentional, even one that would revise ordinary ways of speaking”⁹¹. Differences in accounts of the structure of actions plausibly play a significant role in how interpreters view, and are likely to view DER, and we should expect differences in action theory to cash out in terms of differences in normative claims in relation to intention.

It is one thing to argue that the way we understand action matters for our account of intention, and intention’s relation to wrongdoing, but it is another to argue that we can make a case for a moral difference between intention and foresight in the way that DER suggests. I approach that question in the following chapter.

⁹¹ Warren S Quinn, “Actions, Intentions, and Consequences: The Doctrine of Double Effect,” *Philosophy and Public Affairs*, vol. 18, n.d., p341
<http://philosophyfaculty.ucsd.edu/faculty/rarneson/Courses/QuinnonDDE.pdf>.

Chapter 4 The Moral Significance of what is Intended.

§4.1

This chapter will consider differences in the role intention might play in establishing judgments of permissibility and impermissibility. A number of challenges to DER proceed along the lines that intention is not morally relevant in the way its proponents claim. Some argue that there are alternative and preferable explanations for the cases that are usually used as examples of and to support DER. These arguments suggest that something other than intentional-wrongdoing is doing the explanatory moral work, and therefore that double effect is illusory, false, or has merely secondary moral significance. In this chapter I will focus on T M Scanlon's influential approach to the relationship between intention and permissibility, and the arguments he contends establish DER's illusory appeal.

Double effect reasoning ranges over judgments of permissibility. It provides an account in which harms that are intended are distinguished morally from harms that are foreseen to result from one's action or inaction. It is found in a moral tradition in which certain kinds of intentional actions fall under absolute moral norms, which impose obligations not to act in certain ways. This is not a simple or straightforward moral distinction, because not all wrongdoing is intentional, and merely foreseeing that harm will result from

an otherwise good action does not mean that the action is permissible.

There does, however, seem to be an interesting and persistent core claim to DER that intentions matter, in some foundational and direct way.

I begin with an outline of Scanlon's view, and a related position that distinguishes first and second order moral significance. Both of these views challenge DER. Two cases in particular support these positions – those of blameless impermissible action, and blameworthy permissible action. I then focus on three strands of Scanlon's position, firstly that the reasons for which we act and our intentions can impart meaning to our actions that is relevant to permissibility. Scanlon argues that this is only of derivative relevance, and I consider some counterexamples. Secondly, that intention can have predictive significance, and I argue that DER could not be grounded on intention's predictive role without collapsing into consequentialism, and thirdly, Scanlon's contention that intention cannot be relevant to permissibility because we do not deliberate about our intentions, in the sense of choosing between the intentions we might apply to a particular course of action. In this final section I will argue that Scanlon fails to establish that intention has no relevance to permissibility, particularly if exclusionary reasons exist (reasons not to act for a reason or with an intention).

§4.2 Scanlon on intention

TM Scanlon's subtle criticism of DER, and specifically the way intention might be morally significant, has been an important contribution to the contemporary literature on double effect⁹². The main thrust of his criticism is that the permissibility of an action does not depend on the agent's intentions in the way that the DER maintains, and that we are led to view what is really just an 'illusory' appeal of DER, because of a difference between two closely related forms of moral judgment, which can be based on the same moral principles. The deliberative use of moral principles answer the question of permissibility, whereas the critical use of moral principles answers questions about the agent's blameworthiness. Scanlon argues that intention does not and should not feature in our deliberative use of moral principles, and therefore it is not non-derivatively relevant to permissibility.⁹³

"It remains true that a person who intends to kill noncombatants in order to shorten the war by undermining morale (and has no further justification for her action) acts wrongly - she has an intention that she should abandon. But this truth should not be taken to suggest that intention has a fundamental role in determining the impermissibility of this action, in the way claimed by double

⁹² Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame*.

⁹³ Ibid. Chapter 1.

effect. The intention is wrongful because the act intended is wrongful, and the act is wrongful because of its likely consequences, not (fundamentally) because of the intention."⁹⁴

Before approaching Scanlon's position in more detail, and offering some objections, I consider a line of thinking that is also critical of DER and close to Scanlon's view. Judith Jarvis Thomson's approach to DER rests on a distinction between evaluating acts and evaluating agents. Scanlon's view is distinctive and more subtle than Thomson's argument.

§4.3 First-order and second order moral significance.

Alan Donagan casts first- and second-order morality in terms of a distinction between: "actions considered materially and actions considered formally. Considered materially, an action is a deed, and no reference is made to the doer's state of mind in doing it." ⁹⁵. For Donagan, first-order morality concerns actions as permissible and impermissible, and "considers effects attributable to an agent without reference to the agent's epistemic and volitional states". In this way, intentions, beliefs and other volitional or mental states are excluded from the question of whether an action is permissible. Thomson suggests a general thesis that follows this line of

⁹⁴ Ibid. p29.

⁹⁵ A. Donagan, *The Theory of Morality* (Chicago: Chicago University Press, 1977). p55 and see Bennett, *The Act Itself*. p46ff.

thought: “it is irrelevant to the question of whether x may do alpha what intention x would do alpha with if he or she did it”⁹⁶.

There are a number of related distinctions in the literature. It should be noted at this stage that the first order/second order characterization of this distinction departs from the way this pairing is normally employed in philosophical contexts. Second order beliefs, for example, are beliefs about beliefs, and first order beliefs are just beliefs. Second order beliefs differ from first order beliefs in virtue of their subject matter (other beliefs). The distinction between first and second order moral significance is not like the epistemological distinction because second order moral features (such as the appraisal of moral character) are not necessarily evaluations of first order moral features (such as the results of actions), but may involve a range of considerations such as what the agent ought to have known, their motivations, desires etc. The difference between agents and acts is not like that between beliefs-about-beliefs, and beliefs. That said, this language runs through the literature on double effect⁹⁷, and is helpful in characterising a certain kind of objection to DER, which relegates intention not just to a second order significance, but to a secondary moral significance.

The question “May one do alpha?” is the first order question of permissibility, which, it is argued, is not only separable from the question of the evaluation of the intentions with which one acts, but is primary, or

⁹⁶ Thomson, “Self Defence.” p294.

⁹⁷ Cavanaugh, *Double Effect Reasoning*.

foundational. Thomson argues that it is a “very odd idea” that intentions play a role in fixing what one may or may not do, because “Can alpha be done?” and “Can this agent do alpha?” Are different kinds of questions. When considering the deliberations of the tactical and terror bomber (in the example above), she asks “can anyone really think that the pilot should decide whether he may drop the bombs by looking inward for an intention with which he would be dropping them if he dropped them?”⁹⁸.

Thomson’s rhetorical question about the bomber ‘looking inward’ for an intention that might attach to dropping the bombs will be familiar from Chapter 3 (on Intention in Action and Double Effect), where I noted Anscombe and Davidson’s contrasting accounts of action. A Davidsonian view might lead one to think that looking inward will be of incidental importance to the act (understood as an event with a particular cause). Anscombe’s view, on the other hand, takes intentional actions to be those for which the question ‘why?’ have application, and is better able to account for rational structures found in actions. The Anscombian view can explain the unity of an action that extends over time and might be interrupted. The agent’s practical reasoning provides important elements in understanding the action itself (rather than just features of one’s inward mental life), and this gives us grounds to think that the difference in the bombing example may be a question of different kinds of actions, rather than (merely) different answers to introspective questions.

⁹⁸ Thomson, “Self Defence.”

Scanlon does not make a distinction between acts and agents in quite the way Thomson does, since the distinction that motivates his claim that DER is illusory is between the deliberative and critical use of moral principles.

Scanlon and Thomson are aligned, however, in that they both deploy in their favour the thought that an agent can culpably do something that is permissible, and inculpably do the impermissible ⁹⁹.

These possibilities may show that intention and permissibility come apart in a way that could undermine DER. If permissibility does not (ever) depend on intention then the intention condition of DER is incorrect.

§4.4 Blameless, Impermissible Action

Does the possibility of inculpably or blamelessly doing the impermissible show that intentions have no role in establishing permissibility? The most obvious way one can blamelessly do something that is impermissible is if one acts in inculpable ignorance of a morally relevant feature. In not knowing that the wine I give you is poisoned, and having no reason to suspect the wine, I am not blameworthy, even though poisoning a guest is impermissible.

⁹⁹ See e.g. Donagan, *The Theory of Morality*. P118, Thomson, “Self Defence.” Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame*. Chapter 1.

The poisoning in this case is accidental and involuntary in a relevant sense, and since the voluntary “serves as morality’s threshold”¹⁰⁰ then not knowing the wine is poisoned is fully exculpatory (providing I have not having been negligent or reckless in not having tested the wine first etc). The agent does act voluntarily, but because he neither knows nor could be expected to know about the poisoned cup, this puts the *poisoning* beyond the bounds of morality. There is a striking parallel between the unwitting poisoner and a poisonous tree (to modify one of Cavanaugh’s examples); saying the tree acts impermissibly is incongruous (to say the least), and “what the tree did is more clearly not an act than what I involuntarily caused”¹⁰¹. Thomson’s “Day’s End” case is a version of this kind of argument:

“Day’s End: B always comes home at 9:00 pm, and the first thing he does is to flip the light switch in his hallway. He did so this evening. B’s flipping the switch caused a circuit to close. By virtue of an extraordinary series of coincidences, unpredictable in advance by anybody, the circuit’s being closed caused the release of electricity (a small lightning flash) in A’s house next door. Unluckily A was in its path and was therefore badly burned.”¹⁰²

B, according to Thomson, violates a claim of A, where ‘ought’ is understood in the objective sense and does not entail fault. B therefore ought not to have flipped the switch. We might question, however, whether B

¹⁰⁰ Cavanaugh, *Double Effect Reasoning*. p128

¹⁰¹ Ibid.

¹⁰² Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990). p229.

acts impermissibly in this case. Thomson's objective ought, which is the basis for saying that B's action is impermissible but not blameworthy, is hypothetical - if these other conditions are met, then the action *would* be impermissible.

It might seem "odd" to Thomson that permissibility turns on whether or not we tell B some extra information (that flipping the switch will cause A's electrocution) however, there are grounds to think that, as Scanlon argues *pace* Thomson, the objective moral ought that we are tempted to apply to *Day's End* lacks the right kind of moral content ¹⁰. For Scanlon permissibility is determined by "those features of our situation that we should take as counting for or against an action", and "this is what makes it seem that the idea of permissibility might coincide with the 'objective ought'" ¹⁰³. Scanlon's subtle position is that "the sense of 'ought not' that is directly linked with the moral impermissibility of actions is [not] the objective sense" but is linked to those features that it would be reasonable for an agent to believe (whether or not an agent actually does believe them).

An advantage of Scanlon's view is that it avoids a danger that an objective sense of ought might apply to natural disasters, since we can say something similar about them: if they were caused willingly, they would be impermissible. However it is much less intuitively plausible to claim that natural disasters are impermissible. Here we can see that Scanlon avoids

¹⁰³ Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame*. p50.

Cavanaugh's critique (based on morality's threshold) and the problematic association in evaluating acts completely apart from volitional states. He does this by tying permissibility to the deliberative use of moral principles.

It remains to be seen whether there can be an inculpable, impermissible and voluntary act that would establish a separation between permissibility and mental states of the kind Thomson is looking for. In Day's End, we should reject the premise that B's action is impermissible. Scanlon suggests that acting in extreme fear might fit the bill as an inculpable impermissible action: "extinguishing fault without making what is done permissible"¹⁰⁴. Scanlon does not develop this example, but it is at least plausible to suggest that fault is extinguished only to the degree that we think of the act-in-extreme-fear to be involuntary, which means that the fear example would be relevantly similar to Day's End. We therefore have reason to question some of the main lines of argument that claim intention cannot be relevant to permissibility on the basis of differences between first and second order considerations arising from blameless impermissible actions.

§4.5 Blameworthy Permissible Action

It is possible for a proponent of DER to grant that some morally relevant states of mind do not relate directly to permissibility; for example, someone might reluctantly do a good (i.e. permissible) thing, and be blameworthy for

¹⁰⁴ Ibid. p220 n7.

that reluctance. How he feels about doing the right thing is relevant to his character, and can mean he is blameworthy even while doing the right thing. If this kind of case is supposed to ground the primary/secondary distinction, notice that nothing prevents there from being more than one state of mind at work in this example: a permissible action might require a certain state of mind (or for DER, the absence of certain intentions, and the presence of due care etc.), and also be accompanied by blameworthy attitudes. So, the fact that it is possible for an agent to be blameworthy for some aspect of his state of mind while he is acting permissibly does not establish the requisite separation between intention and permissibility on the basis of primary and secondary moral features.

There is more, however, to the case of blameworthy permissible action. For Scanlon, this kind of case is central to his critique of DER. He views DER as too restrictive, and that cases of permissible action that are impermissible by the lights of DER show that DER merely has illusory appeal. One such example used by Scanlon¹⁰⁵ is that of a voodoo practitioner who appears to be morally blameworthy (and culpable) for maliciously sticking pins in a doll in order to harm an acquaintance, but given that we have no reason to think that sticking pins in dolls is harmful, how could it be impermissible?

In response to Scanlon's example, take a case where the voodoo practitioner sticks pins in the doll in order to kill the acquaintance, and not merely harm

¹⁰⁵ Ibid. p46.

them. From Scanlon's point of view, based on the argument provided in the voodoo/harm case, this would still be a situation where the action is permissible, but the agent blameworthy. When the action that is subject to a judgment of permissibility is described in stark terms; sticking-pins-in-dolls, it is easy to view this as permissible. This is not, however, a full description of the action in question. There are other pertinent descriptions of the voodoo practitioner's action. Indeed, the rational structure found in the action – the chain of means and ends that function as answers to 'why?' and 'how?' questions, and that help explain the events as an action (see Chapter 3) reveal that the action is chosen as an attempted killing, rather than just as sticking pins in dolls. Though not a killing, what is done is still an attempt to kill, and this is determined or constituted by the agent's intention; an attempt cannot be identified without reference to the agent's intention. It is relevantly incomplete to say that the voodoo practitioner is 'just' sticking pins in a doll. Her action is more 'thick' than this, in that it is also an attempt to harm or kill, and the rationale for her action is that it harms. The worry here is that in divorcing intention from a fundamental role in permissibility, it may be difficult to account for the impermissibility of attempts.

This counter to Scanlon's voodoo objection is not complete. He might still respond that even if the action is properly described, the role of intention in an attempt is not to define what is permissible, though it will involve a critical use of moral principles in assessing the blameworthiness of the agent. In order to understand the permissibility of attempts, Scanlon may

say, we need to look elsewhere, perhaps to the endangerment¹⁰⁶ or the facilitation of other harms¹⁰⁷ that attempts may cause.

§4.6 Meaning

It is not clear, however, that this is a reliable strategy for Scanlon to use, since he grants that an agent's reasons for action can affect the meaning of an action, and this can be relevant to permissibility. If this is the case, then there may be a way of characterizing the voodoo practitioner's action as impermissible due to its meaning, and there can therefore be a role for intention in defining what is permissible.

The example he uses is calling a sick relative, and that the meaning of this call is different for all concerned if it is done in order to care for them, in order to display the appearance of concern in order to impress a wealthy relative, or even if it is done in order to take pleasure in the relative's suffering. Scanlon writes:

In each of these cases my call indicates something different about our relationship, and we have different reasons for valuing it, being disappointed by it, being ashamed of it, resenting it, cherishing it, or reacting to it in other ways.¹⁰⁸

¹⁰⁶ This is suggested by Ulrike Heuer, "Intentions, Permissibility and the Reasons for Which We Act," in *Practical Normativity. Essays on Intentions in Law and Practical Reason*, ed. George Pavlakos and Veronica Rodriguez Blanco (Cambridge: CUP, 2015), <https://philpapers.org/rec/HEUIPA>. p27ff.

¹⁰⁷ Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame*. p42ff.

¹⁰⁸ Ibid. p52.

It seems here that permissibility may depend here on meaning, and not just on whether in acting harms are facilitated. However, Scanlon argues that this dependence is derivative, depending not on actual intentions and the reasons the agent has, but on “other moral principles requiring openness about one’s aims.”¹⁰⁹

Heuer presents a stronger case¹¹⁰ where the ill person is a friend of the person visiting. If the sick person finds out that the visitor is not visiting with friendly intentions, and is, say, trying to win a bet, the person visited may be outraged, take the friendship to be over, and may also think that what was done was wrong. If this is a case of wrongful action, Heuer argues, then it would be wrong on Scanlon’s account because the behaviour is misleading (the friend is not being open about their aims). However, it is also plausible (pace Scanlon), that it is wrong because the visitor fails to act like a friend. “As a friend you ought to have acted for certain reasons but not for others, [and...] Scanlon has to deny that, as a friend, you *ought* to have acted differently (i.e. for different reasons).”¹¹¹

This reading views acting for certain reasons, in a friendship, to be relevant to permissibility, and therefore undermines Scanlon’s charge that meaning (and intention) is only derivatively relevant to permissibility. Friendship does not just involve norms in relation to how we believe our friends might be harmed in being misled, but involves norms about (not) acting with a

¹⁰⁹ Ibid. p62.

¹¹⁰ Heuer, “Intentions, Permissibility and the Reasons for Which We Act.”.

¹¹¹ Ibid. p29.

particular intention. If this account of friendship is plausible, we should consider the possible scope its implications. Scanlon argues that in general intention is not relevant to permissibility, but we might say that in general we find ourselves in some form of relationship with the people we encounter (as friends, colleagues, family members etc.), and in general our actions are imbued with meaning given by the reasons for and intentions with which we act in the context of those relationships.

Applying this to the voodoo example, friends and even acquaintances deserve not to be the subject of actions the meaning of which is to kill them. Just as friendship provides reasons for (not) acting with a certain intention or for certain reasons, some more wide-ranging relationship may provide reasons for not acting with the intention to kill an acquaintance. As Garcia puts it: "What matters to us and to her moral status (and that of her choices and actions) is how a moral subject feels about some person; it is her inner life, not her condition as a possible cause of external advantages or setbacks. That inner life matters to us, and therefore in morality, in its own right, not in a way that is merely contingent on causal outcomes. This is part of a needed "Psychological realism" that some philosophers have urged on moral theorizing"¹¹²

¹¹² See for example Jorge Garcia, "The Virtues of the Natural Moral Law," in *Natural Moral Law in Contemporary Society* (Ed. Zaborowski, H). (CUA Press, 2010), 359. Owen Flanagan, *Varieties of Moral Personality* (Cambridge, MASS, Harvard University Press, 1991). GEMAnscombe's "Modern Moral Philosophy" *Philosophy*, vol. 33, no. 124 (January 1958), is also relevant here, as she argues for greater attention to moral psychology as a foundation for moral philosophy.

If we grant that the meaning of action can be relevant to permissibility, as Scanlon begins to suggest, but that Heuer builds on, then a defender of DER may be able to claim that the scope of meaningful action is so wide as to support the claim that intention can be morally determinative in just the way suggested by DER.

§4.7 Predictive Significance

Aside from having a role in determining meaning, Scanlon argues that intentions can also have predictive significance, as “determinants of the likely consequences of the proposed course of action”¹¹³. He argues that this significance is valid¹¹⁴, but is derivative and does not give intention a foundational role.

This appears to be correct; a clear intention might not only more reliably cause outcomes as part of the current proposal or plan, intentions might also make future decision making of the same type more likely. Intentions would be seen as good predictors, increasing the chance of success of current plans, and involved in building habits that influence future behavior.

It is noteworthy that some have sought to interpret DER as being founded on this kind of consequential significance. In terms of this chapter, the line of argument is that intention does and can have the kind of moral significance

¹¹³ Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame*. p87.

¹¹⁴ Ibid. p30.

that DER requires, a moral relevance for permissibility that Scanlon denies. In this section on predictive significance, I consider one form of significance that Scanlon accepts, and that I agree is non-foundational, but that others understand to be at the heart of the distinction between intention and foresight. I will consider whether this kind of consequential understanding of the significance of intention could function as a basis for DER's intention condition. This is interesting territory, since DER is widely understood as an archetypally non-consequentialist approach, and the predictive significance of intention may open up the way for an interpretation of DER that has a consequentialist character.

Consequentialists could view intentionally causing effects differently to causing those same effects unintentionally, or accidentally. These effects will be magnified and have more impact on the future, for better or worse, than causing effects unintentionally or as a merely foreseen side effect. Consequentialism, then, could offer an account of intentions in which they carry a special moral significance, but this predictive sense would be only one of a range of ways that intention carries significance.

Thomas Cavanaugh argues that H.L.A. Hart shares this understanding of the distinction between intention and foresight, and adds that Hart rejects the ethical relevance of double effect reasoning because he believes the

distinction between intention and foresight to be based on the probability of causing a particular outcome ¹¹⁵. Hart writes that:

if the craniotomy is contrasted with the removal of the womb containing the foetus as a case of 'direct' killing it must be on the basis that the death of the foetus is not merely contingently connected with craniotomy as it is with the removal of the womb containing it. But it is not clear that the supposition of the survival of the foetus makes better sense in the one case than in the other. [Hart, quoted in (Cavanaugh 2006, 119)]

Focusing on Hart's use of contingency, (I shall put aside the difficulties surrounding this particular pair of cases in the current chapter (see Chapter 5 on closeness)), it does appear that Hart takes this (the contingency or necessity of the outcome) to be the only possible basis of a moral distinction between the two cases. On these grounds, Hart is quite right that the distinction between the craniotomy and hysterectomy cases would be unsustainable, since the thought experiment is constructed with cases in which death is just as likely.

The claim of DER is that there is a moral difference between intending an outcome and foreseeing an outcome even where that foresight is certain, so in focusing on the likelihood of the outcomes in the quote above, Hart tries

¹¹⁵ Cavanaugh, *Double Effect Reasoning*.

to find moral significance in the wrong place, and we can say that predictive significance alone cannot account for the intend/foresee distinction in craniotomy/hysterectomy cases.

It does not make sense to ground DER's intention condition as being simply about, or ultimately grounded in future outcomes. Jonathan Glover pushes this kind of interpretation in his critique of DER. He argues that any intuitive appeal of the double effect cases is mistaken, or due to what are in fact consequentialist features of the case. He further suggests that once some utilitarian calculation is admitted by the double effect reasoner, as in the fourth proportionality condition, it becomes difficult to maintain any other non-utilitarian conditions: "having allowed [a] concession to utilitarian calculation [as part of the fourth proportionality condition], where is a line to be drawn, and why?"¹¹⁶

This is perhaps just to say that a consequentialist interpretation of the moral significance of intention is not a viable version of the intention condition in DER, it is a rejection of the doctrine, involving and entailing a different moral theory. Glover is right to say that the consequentialist is "bound to see this moral doctrine as unacceptable: depending on a distinction without a difference"¹¹⁷. So, if intention's only moral significance is in its predictive significance, then DER could not be supported.

¹¹⁶ Jonathan Glover, *Causing Death and Saving Lives* (London: Penguin, 1979).

¹¹⁷ Ibid. p88.

On the standard formulation of DER that we are testing against Scanlon's objections in this chapter, intention condition is pertinent to DER even if a particular bad intention, say, to kill, were to lead to remorse, reform and future good acts, the fact that it is intentional killing is conclusive, and the further predictable effects (which might include remorse, reform etc) are non-foundational. For the intention condition to be distinct, involving a different kind of concern to the other conditions (and it is often picked out as providing 'the' key underlying insight associated with DER), and in order for DER not to collapse into a convoluted version of consequentialism DER needs not to be founded entirely on intention's predictive significance.

So, while there are elements of a consequentialist approach to DER that could be admitted and shared by a supporter of DER, namely a consideration of the predictive significance of intention, this cannot be the basis of the moral significance of DER. Hart's consequentialist basis for the intend/foresee distinction cannot explain the distinctions made in the DER literature, and Glover's approach is to offer a consequentialist critique of DER, rather than an interpretation. The fact that DER involves some consequential thinking is not enough for it to collapse into consequentialism. What is needed for DER to survive is a non-consequentialist account of the moral significance of the intend/foresee distinction.

§4.8 Deliberation and Intention

Cases of blameworthy permissible actions and his diagnosis of the confusion made between deliberative and critical uses of moral principles are not Scanlon's only arguments against double effect and the role that it implies for intention.

Scanlon also puts pressure on the idea that we can choose between the reasons for which we act, whether we can choose which intentions to deploy in acting. We can on his account choose what to do, but not which considerations to see as reasons for acting. If we cannot choose between our intentions then intention is disconnected from the deliberative use of moral principles, and this, according to Scanlon is what determines permissibility.

In "autonomous benefit" cases, like Gregory Kavka's 'toxin puzzle', one stands to benefit from forming a certain intention but not from carrying out the associated action. The example arose in a normative context in relation to nuclear deterrence, but for our purposes it raises interesting questions about intention and deliberation, and could serve to bolster Scanlon's case.

An eccentric billionaire strikes the following bargain, providing you with a vial of toxin:

"If you drink [the toxin], [it] will make you painfully ill for a day, but will not threaten your life or have any lasting effects.... The billionaire will pay you one million dollars tomorrow morning if, at midnight

tonight, you intend to drink the toxin tomorrow afternoon.... You need not drink the toxin to receive the money; in fact, the money will already be in your bank account hours before the time for drinking it arrives, if you succeed.... [The] arrangement of...external incentives is ruled out, as are such alternative gimmicks as hiring a hypnotist to implant the intention..."¹¹⁸

The conclusion we are invited to draw from the puzzle is that it is not obvious you can win the million dollars, since it is presumed that you cannot form the intention to drink the toxin if, once midnight passes, you are confident that you will have no reason to drink it, and good reason not to, so you will not drink it. Knowing that you will have good reasons to abandon your intention once the money has been won, means that it is hard to see how you could honestly form the intention to drink the poison and win the prize.

When considering a series of puzzles over whether an agent may do the right thing for the wrong reason, that is, act permissibly but with an intention to harm, Scanlon notes that

[I]t is odd to say, in the case of the person who thinks that the only good reason to save a person is the advantage to her of that person's staying alive, that the only permissible course of action for her is to save the person for the right reason. Saying this is odd because it

¹¹⁸ Gregory S. Kavka, "The Toxin Puzzle," *Analysis* 43, no. 1 (January 1983): 33, doi:10.2307/3327802. p33-34

presupposes that it is open to her to choose to act out of concern for the person's well-being. It is open to her to choose whether to save the person or not, but not open to her to choose to see a certain consideration as a reason for doing so. Therefore, according to the hypothesis we are considering, the question of permissibility applies only to the decision whether to save.¹¹⁹

So the argument is that permissibility only applies to the decision to act, and not to one's intention (the reason she chooses to save), because it is not open to the agent to choose which intention she adopts in acting.

In this way, the toxin puzzle could be seen as support for Scanlon's argument that intention does not have deliberative moral significance. One does not or cannot deliberate about which intention to deploy, but rather about what to do, then Scanlon's point about deliberative significance may be borne out. Deliberation in the toxin case seems tied to drinking the toxin in a way that makes it very hard to see how one could deliberate about forming an intention just to win the money.¹²⁰ The formation of one's intentions are influenced or governed, not by reasons for or against having the intention, but by the reasons for or against acting (drinking the poison).

¹¹⁹ Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame*. p61.

¹²⁰ Some have argued that it would be possible to win the billionaire's bargain and defeat the puzzle – to form the relevant apparently contradictory intention though on these accounts it is a difficult and remote possibility (see Mele "Intentions, Reasons, and Beliefs: Morals of the Toxin Puzzle" *Philosophical Studies* 68:171-194, 1992). Irrespective of whether it is difficult or impossible to form the prizewinning intention, this is all grist to Scanlon's mill, or rather water for his intuition pump, that intentions themselves only have indirect or derivative moral deliberative significance.

One possible response to this line of criticism of Double Effect might be to say that even though we do not deliberate about intention formation, we can choose to act with the knowledge that in acting we would have a particular intention. We *can* therefore take intentions into account in a way that is relevant to permissibility. We would not be deliberating directly or only about the intention (which per the toxin puzzle is at least suspect), but we can deliberate about what to do, taking into account our beliefs, desires and what our intention would be in acting.

Alongside a consideration of possible outcomes, it seems reasonable for an agent to ask what in fact they would choose to do (intend as a means or as an end) in the relevant scenarios; whether the proposed action would in fact be e.g. a murder or a killing. In this way it would still be possible to take intentions into account, even granting the view that intentions cannot be manipulated in the way necessary to win the toxin puzzle.

The argument then is that it is possible to take intentions into account, even if we cannot choose what to intend on the basis of the desirability of that intention. It is a mistake to see DER as involving an internal deliberation about the desirability of intentions. Wedgwood, rightly in my view, observes that Scanlon and Judith Thomson's understanding of how to apply DER involves a 'looking inward' to work out what intention I would have in acting (say, dropping the bombs). We see this when Thomson asks: "can anyone really think that the pilot should decide whether he may drop the bombs by looking inward for an intention with which he would be dropping

them if he dropped them?”¹²¹. Wedgwood echoes Anscombe in calling this a ‘travesty of the doctrine of double effect’¹²², since double effect does not concern an internal investigation into what one would be intending in dropping bombs (and the reasons for or against particular intentions, but the thought that one should never choose to “drop-the-bombs-to-kill-the-civilians”. In deciding whether to drop-the-bombs-to-kill-the-civilians, one can take intentions into account, and the various means that one might adopt.

The question of exactly how intentions might feature in our deliberation is not clearly defined by proponents of double effect. The history of DER (see Chapter 2) might seem to bear out the thought that it is primarily focused on critical rather than deliberative use of moral principles. It grew to prominence in the late scholastic and manualist traditions, where the manuals were used to guide confessors in attributing blame (they were interested in any exculpatory or aggravating factors, and how severe a penance would be appropriate). On the other hand, DER is very widely taken to provide principles that ought to guide action and deliberation about action.

The view that double effect is a helpful moral heuristic and should be seen as a guide to deliberating about difficult moral cases is not universal among those that defend DER. Frey argues, for example, that ““double effect” is not

¹²¹ Thomson, “Self Defence.”

¹²² Wedgwood 2011; 468

a principle that guides sound practical deliberation, in the way that “you may never do evil that good may come” is.”¹²³ Anscombe is also wary of reading too much into double effect (see Chapter 2 on her interpretation of St Thomas) and rather than endorsing double effect in its traditional formulation, prefers to characterise the central insight as “the principle of the side effect”, which (merely) blocks an inference from the impermissibility associated with a prohibition to the impermissibility of causing similar outcomes as side effects: “the prohibition on murder does not cover *all* bringing about of deaths which are not intended”¹²⁴.

This is all the more plausible if the intention condition of DER functions as or expresses ‘exclusionary reasons’ along the lines that have been developed by Raz¹²⁵ and Heuer¹²⁶: though one may have many reasons to act in a particular way, (or, one may have a range of different intentions in so acting), acting for particular intentions or with particular intentions are excluded from the range of permissible actions. On this view an action may be wrong if done for certain reasons but may be permissible if done for other reasons. The friendship example above is a case where the friendship excludes acting with selfish or malicious intentions, and Heuer suggests another:

¹²³ J. A. Frey, “Practical Knowledge and Double Effect,” in *Intention and Double Effect* (Notre Dame Press (forthcoming), n.d.).

¹²⁴ G. E. M. Anscombe, “Action, Intention, and Double Effect,” in *The Doctrine of Double Effect: Philosophers Debate a Controversial Principle.*, ed. P.A. Woodward (Notre Dame Press, 2001), p61.

¹²⁵ Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999), doi:10.1093/acprof:oso/9780198268345.001.0001.

¹²⁶ Heuer, “Intentions, Permissibility and the Reasons for Which We Act.”

You have a reason to give your child the best education available, but you also have a reason to take the costs to yourself into account.

However, you promised the child's mother not to act for reasons to do with your own convenience...The reason to keep your promise is an exclusionary reason: it is a second-order reason, a reason not to act for certain reasons. Thus it is not a reason for or against sending the child to a particular school.

This kind of second order reason is a robust counterexample to Scanlon's argument that intentions do not have deliberative moral significance, and therefore that DER is merely illusory. Even if the Toxin Puzzle strengthens his point, it still appears as though we can take the reasons with which we act into account. When combined with our discussion on meaning, and the example where acting out of friendship requires that it be done with certain intentions, we have arguments against both Scanlon's relegation of intention from the deliberative use of principles, and against the argument that intentions are merely of derivative or secondary importance to permissibility.

The move to see DER as involving exclusionary reasons (i.e. excluding certain intended actions), may introduce a problem to a supporter of DER, since it means that the deliberation that takes intention into account is not directly related to what we cause, but is rather about our reasons for action. This dislocation from normal ethical decision-making may be problematic in its own right, nonetheless, this indirect deliberation stands as a counter-

example to Scanlon's claim that intentions cannot have deliberative significance, and in light of this, we should question Scanlon's conclusion that DER merely has 'illusory appeal'. The question about whether intentions are foundational will not be settled by a distinction between the deliberative and critical use of moral principles, but by whether exclusionary reasons exist and are relevant to permissibility.

To conclude, I have argued that DER's intention condition cannot be based on the predictive significance of intention. There is more opportunity to ground a fundamental moral significance of intention in meaning, and particularly if we have reason to believe that exclusionary reasons exist. Scanlon's argument that intention cannot have deliberative significance (and he needs intention to be excluded if his charge that DER is illusory is to be sustained) is not robust even when supported by Kavka's Toxin puzzle, since we can take intentions into account in deliberation, even if we cannot choose intentions on the basis of their desirability. The reasons an agent has, her actual intentions, can contribute to the meaning of actions (which are relevant to permissibility), and can be deliberated about. They can therefore appear on both sides of Scanlon's distinction between the deliberative and critical uses of moral principles.

Chapter 5 Approaches to the Problem of Closeness.

Introduction

This Chapter considers the problem of closeness as a challenge to defenders of DER, and evaluates a number of strategies that might resolve or otherwise deal with this problem. I outline the problem and focus discussion on how the first personal account of intention might address closeness. I also consider a hylomorphic approach, Wedgwood's non-absolutist solution, and conclude with Watt's approach that does not attempt to understand how intentional killing should encompass very close actions, but that emphasises the relevance of close prohibitions. I favour a two-pronged approach involving a development of the first personal practical reason approach to resolving some of the difficult cases, combined with Watt's insight that there may be relevant prohibitions beyond a prohibition on killing that explain the impermissibility in closeness cases.

§5.1 The Problem of Closeness

As a very quick explanation of the focus of this chapter is that we are interested in blocking an argument that the terror bomber might make that they are not really intending to kill the civilians, but are in fact intending something that is very close to killing, results in civilian death, but is not

prohibited. The standard version of the ‘problem of closeness’ relates to and is understood to be a problem for the moral distinction between intention and foresight, so is a key challenge to double effect reasoning. Responses to the problem of closeness have been many and varied. It has motivated some authors to supply new versions of DER, and some to modify or interpret the traditional conditions¹²⁷. Marquis identifies thirteen different approaches to solving closeness¹²⁸, ranging from logical, inevitable and ‘felt’ connections to fine grained act analysis, desire based approaches and counterfactual tests.

The heart of the problem is that there is a significant lack of clarity as to what should be considered to be intended in some cases. Delaney summarises the problem well: “With regard to many activities that double effect is traditionally thought to prohibit, what might at first look to be a directly intended bad effect is really, on closer examination, a directly intended neutral effect that is closely connected to a foreseen bad effect”¹²⁹.

The problem of closeness challenges the distinction between intention and foresight by arguing that it is either arbitrary or so difficult to draw as to

¹²⁷ See Warren S Quinn, Public Affairs, and No Autumn, “Actions , Intentions , and Consequences : The Doctrine of Double Effect Actions , Intentions , and Consequences : The Doctrine of Double Effect” 18, no. 4 (2007): 334–51; Alexander R. Pruss, “The Accomplishment of Plans: A New Version of the Principle of Double Effect,” *Philosophical Studies*, April 17, 2012, doi:10.1007/s11098-012-9925-4.

¹²⁸ Donald B. Marquis, “Four Versions of Double Effect,” *The Journal of Medicine and Philosophy* 16 (1991): 515–514. In Woodward, P.A. *The Doctrine of Double Effect: Philosophers debate a controversial principle* (Notre Dame, University of Notre Dame, 2001) pp156 – 185

¹²⁹ Delaney, N. “Two Cheers for Closeness: Terror, Targeting, and Double Effect”, *Philosophical Studies* 137: 335-367

compromise the usefulness of double effect reasoning¹³⁰. This lack of clarity 'on closer examination' suggests that differences in intention and the intent/foresight distinction more generally cannot explain the moral phenomena, that is, moral judgments and intuitions about the various cases.

The set of cases that form the focus of the problem of closeness apply it to the means condition, that is, to the relation between on the one hand what one intends or adopts as a means to achieve one's end (see chapter on the means condition) and on the other, what one foresees but does not intend results from that means. The difficulty is in specifying what does, or can, or should count as intended, and what is merely foreseen.

Philippa Foot's original formulation of the problem of closeness is as follows:

Consider the story, well known to philosophers, of the fat man stuck in the mouth of the cave. A party of pot-holers have imprudently allowed the fat man to lead them as they make their way out of the cave, and he gets stuck, trapping the others behind him. Obviously the right thing to do is to sit down and wait until the fat man grows thin; but philosophers have arranged that flood waters should be rising within the cave. Luckily (luckily?) the trapped party have with

¹³⁰ See (among others) Hart, H.L.A. *Intention and punishment* (1968) in *Punishment and Responsibility: Essays in the Philosophy of Law*, Davis, N. *The Doctrine of Double Effect: Problems of interpretation* in the *Pacific Philosophical Quarterly* 65, 107-123, Marquis, D. *Four Versions of Double Effect* (1991) in Woodward (ed.) *The Principle of Double Effect*, Bennett, J. *The Act Itself* (Oxford, Clarendon Press, 1995) and DiNucci *Ethics Without Intention* pp104ff.

them a stick of dynamite with which they can blast the fat man out of the mouth of the cave. Either they use the dynamite or they drown. In one version the fat man, whose head is in the cave, will drown with them; in the other he will be rescued in due course. Problem: may they use the dynamite or not? [This example is introduced in part] because it will serve to show how ridiculous one version of the doctrine of the double effect would be. For suppose that the trapped explorers were to argue that the death of the fat man might be taken as a merely foreseen consequence of the act of blowing him up. (“We didn’t want to kill him...only to blow him into small pieces” or even “...only to blast him out of the cave.”) I believe that those who use the doctrine of the double effect would rightly reject such a suggestion, although they will, of course, have considerable difficulty in explaining where the line is to be drawn. What is to be the criterion of “closeness” if we say that anything very close to what we are literally aiming at counts as if part of our aim?¹³¹

Closeness in this example is used as a solution to a problem rather than being a problem itself, and some writers argue as though closeness is enough of a solution to be used in defense of DER. Delaney writes that “due to the closeness between detonation and killing, an intention to detonate...just is part of a limit complex intention to kill”¹³² Blowing up the pot-holer is, it seems, so close to killing him that we ought to evaluate those

¹³¹ Foot, P. “The Problem of Abortion and the Doctrine of the Double Effect” reprinted in Woodward *The Doctrine of Double Effect* (South Bend, IN, Notre Dame Press, 2001) p145ff

¹³² .

two actions in the same way. That is, if it is impermissible to murder him it is impermissible to blow him up, and one cannot use the excusing factor of one's limited intention to avoid blameworthiness via double effect. So, the *problem* is how closeness should be understood, and where the limits ought to be drawn.

To take the problem example further, if an action is described or specified very narrowly and an agent intends the narrow description, it stands to lose morally salient descriptive elements (if described narrowly enough); Samantha might just be moving a knife through space, but this action might equally be "replacing the knife in a rack" or "parting skin in order to injure". Furthermore, "parting someone's skin" might be a true description of an act that is also "murder", and a true description of an act that is also "healthcare". If Sam decides to kill the first mammal he sees, perhaps because a magnate has offered a huge charitable reward, and the first mammal he sees happens to be a human, does Sam intend to kill the human?¹³³ It seems that intention can be fine-grained in this way, that is, it is entirely plausible that an agent may intend very limited descriptions of their actions. This is most plausible where an agent does not realize that her action has other consequences, but it also seems possible that intentions are fine-grained when harmful effects are known/foreseen and not intended, if the intend/foresee (i/f) distinction is robust (see Ch3 and Ch4).

¹³³ This example is from Alexander R. Pruss, "The Accomplishment of Plans: A New Version of the Principle of Double Effect," *Philosophical Studies* 165, no. 1 (2013): 49–69.

Running up against these cases where intention is confined to a morally un- or less problematical act description, is the strong intuition teased out by the potholer case that exploding should just be seen (in moral terms) as *a killing*, or at the very least, tantamount to a killing. The Talmud presents a closely related thought: *Pseek raisha ve-lo yamut* (You can't cut off the head of a chicken and then say you're not responsible for its death.)¹³⁴.

§5.2 Describing plans/finagling closeness.

So far, this seems to be a problem of description. A pair of actions can belong to the same action type under some descriptions and different action type under other descriptions. In *Intention*, GEM Anscombe argues that intentional actions, which admit of many descriptions, will be intentional under one or some of those descriptions, and that 'Why?' questions about plans of action "enable us to narrow down our consideration of descriptions of what he is doing to a range covering all and only his intentional actions"¹³⁵, because why and how questions uncover the agent's practical reasoning. In this way we can draw a principled distinction between intentional descriptions and non-intentional descriptions of an action, the "special sense of the question 'Why?' will reveal "the order there is in this chaos""¹³⁶, that is, the agent's purposes and rational agency in the world.

¹³⁴ Quoted in John Martin Fischer, Mark Ravizza, and David Copp, "Quinn on Double Effect: The Problem of 'Closeness,'" *Ethics* 103, no. 4 (1993): 707, doi:10.1086/293549.

¹³⁵ GEM Anscombe *Intention* (London, Harvard University Press, 2000) section 23 p38

¹³⁶ Anscombe, *Intention*.p80.

What is intended is seen in the context of a practical plan¹³⁷ involving a chain of means-end steps (see Ch1). This approach gives us some resources to respond to a particular kind of closeness case. This is the kind of case where a plan is incompletely described, and it is merely claimed that the intention is innocent. For example, the orders received by RAF Bomber Command in 1941 regarding the carpet-bombing of towns do not mention the deaths of civilians, only destruction and the fear of death that bombing will cause:

“The ultimate aim of the attack on a town area is to break the morale of the population which occupies it. To ensure this we must achieve two things: first, we must make the town physically uninhabitable and, secondly, we must make the people conscious of constant personal danger. The immediate aim, is therefore, twofold, namely, to produce (i) destruction, and (ii) the fear of death.”¹³⁸

One can assume that if the RAF, or Parliament, could have asked the Air Ministry some ‘how’ and ‘why’ questions about this plan, such as asking how fear of death is in fact being achieved, it would eventually become apparent that widespread civilian death is one element in the means-end chain of reasoning that forms their plan of action. It might be the case that the description is deceptive, or self-deceptive and either inculpably or culpably

¹³⁷ See Anscombe *Intention* and for example, Bratman *Intentions, Plans, and Practical Reason* (1987).

¹³⁸ 1941 British Air Ministry directive, quoted in DiNucci, E. *Ethics Without Intention* (London, Bloomsbury, 2014) p107.

so. Either way, investigating a plan of action fully can deal with this kind of closeness case.

This is far from a complete solution to the problem of closeness, as it does not deal with effects that without deception are close to one's plan of action. It is possible that the potholers are not mis-describing their practical plan when they say that the death is not intended. They do not need the death (*per se*) of the person blocking the exit in order to make sense of their plan to escape, so it is plausible that the death does not need to feature in their plan (the means they adopt to achieve the goal of escape), though it will of course feature in their deliberation unless they are so callous as to ignore the plight of the stuck potholer.

§5.3 Debate over practical reasoning

At this point it will be important to introduce a gruesome but important example that has shaped much of the literature, in particular the debate among those who are sympathetic to DER. The craniotomy case involves a tragic situation where during labor the baby's head becomes stuck ('obstructed labour') and risks the life of both the mother and child. This problem can be averted by caesarian section but historically (and perhaps in some places with little or no midwifery provision) this real case presents a difficult dilemma, because in doing nothing both mother and child will likely die, and the only apparent solution is to crush the skull/narrow the

dimensions of the head of the baby in order to remove it from the birth canal.

One can see how this case is structurally very similar to the potholing example raised by Foot; an individual becomes a life threatening blockage through no fault of their own and in circumstances where the only way to save a life is by means that are extremely close to intentional killing.

An influential approach here is to agree that the potholers would not intend the death of their stuck colleague in blowing him up, and that the problem ought to be solved by challenging our intuitions, finding the blowing up to be permissible, rather than finding or relying on a criterion of closeness to bridge the gap between the intention and the clearly proscribed action. Notably, some philosophers in the natural law tradition of ethics (whom some have labeled proponents of 'New Natural Law' (NNL) theory) including Germain Grisez, John Finnis and Joseph Boyle¹³⁹ suggest that what is intended, what is 'being done' and what constitutes the object of the action, is settled "by one's practical reason in terms of the desirability characterisation under which one wills the end and the description under which one judges one's chosen means appropriate to that end."¹⁴⁰ Thus, under this theory of action, Grisez writes that "even craniotomy (and a fortiori, other operations [that lead to the death of an unborn baby] meeting

¹³⁹ A central text is Grisez, G. Finnis, J. and Boyle, J. "Direct and Indirect: a reply to our critics" *The Thomist* 65 (2001): 1-44.

¹⁴⁰ 'Intention and Side Effects', Finnis, J. *Intention and Identity* Collected Essays Volume 2.

... conditions [that relate to there being no other life saving option¹⁴¹]) need not be direct killing, and so, provided the death of the baby is not intended (which is possible but not necessary)...could be morally permissible.”¹⁴²

Finnis, Grisez and Boyle write in a later piece that “a surgeon who performed a craniotomy and could soundly analyse the action, resisting the undue influence of physical and causal factors that would dominate the perception of observers, could rightly say “No way do I intend to kill the baby” and “It is no part of my purpose to kill the baby””¹⁴³. Citing this possible ‘undue influence’ of causal factors is important for their view, because the craniotomy is physically indistinguishable from partial birth abortion, but they argue, is to be differentiated morally. I shall call this view the first personal practical reasoning account.

This view, I think can fairly be characterized as ‘radically first personal’¹⁴⁴ as it ties the agent’s intentions, the descriptions she must admit intending to the desirability characterization of what the agent is trying to achieve. The morally salient features are a “matter of the heart”¹⁴⁵, and are not determined by third person descriptions of what is done. Even though what would be a morally important description of an action might be very close to one that is intended, if it is not (and there is no deception etc.) then,

¹⁴¹ See N. Austriaco OP “Abortion in a Case of Pulmonary Arterial Hypertension: a test case for two rival theories of human action” *National Catholic Bioethics Quarterly* Vol. 11, Number 3, (Autumn 2011) p511 for an enumeration of the Grisez’s four conditions.

¹⁴² Grisez, G *The Way of the Lord Jesus*, Vol. 2, *Living a Christian Life* (Quincy, IL: Franciscan Press, 1993) pp502-503, quoted in Austriaco, N. *Abortion in a case of PAH* p511.

¹⁴³ John Finnis, Germain Grisez, and Joseph Boyle, “Direct and Indirect: A Reply to Our Critics” 2, no. March 1995 (2001): 1–44. p24.

¹⁴⁴ Frey, “Practical Knowledge and Double Effect.”

¹⁴⁵ Christopher Tollefsen, “Is a Purely First Person Account of Human Action Defensible?,” *Ethical Theory and Moral Practice* 9, no. 4 (2006): 441–60, doi:10.1007/s10677-006-9024-8.

according to this view, that description does not apply to the act, and does not determine permissibility. Tollefsen expresses this quite strongly:

"If the purely first person account is correct, there can be no criteria [for determining what is intended, and what are side effects]: there is nothing against which to test the agent's action to determine what intention an agent had, or must have had, for it is the agent herself who is the sole determinant of what her intention is"¹⁴⁶

As I have set this up, there is a significant difficulty for the Finnis/Grisez/Boyle NNL approach to the craniotomy case in that it results in a counterintuitive answer, since the actual death of the foetus does not need to feature in the proposal of the doctor; intentions are fine-grained enough to allow that he merely desires, intends and plans to narrow the skull of the foetus in order to remove the life threatening obstruction. If the death of the foetus in the craniotomy case is a side effect rather than an object of intention, then it ought to be evaluated in the same way (at least in terms of double effect) as the hysterectomy case, as opposed to the 'physically indistinguishable' act of partial birth abortion, which (as a premise) falls under the prohibition on deliberate killing of innocents.

The important question here is how fine grained one's account of intention ought to be. Due to its foundation in desirability, and its intensional, first

¹⁴⁶ Ibid.

personal characteristics, the granularity appears to be determined by the question of conceivability. That is, how an agent can or might understand his plan and the available options involving means and chosen ends. This, I suggest below, is not the only constraint or consideration relevant to the way agents form, conceive of and adopt plans.

For Finnis et. al., what is done is determined by one's practical reason, and limited by conceivability. This distinguishes strictly between ends and means that are included in practical plans, and effects that fall outside of those plans. However, there is still a pressure to find a more coarse grained account/criterion of closeness. Bennett proposes what a 'plain man' would think as a way to adjudicate in closeness cases¹⁴⁷, but this is, he acknowledges, perhaps too vague to be useful. He does however indicate a direction that the debate could go, and this reflects an interesting passage in St Thomas's *Commentary on the Nicomachean Ethics*:

"[Aristotle] says it is not easy to assign the sort of thing we must choose in such circumstances [i.e. the case of 'mixed actions'¹⁴⁸]. [Aristotle] assigns as the reason that many differences are found in singulars. Hence the judgment of them cannot be comprised under an exact rule but they are to be left to the evaluation of a prudent man."¹⁴⁹

¹⁴⁷ Bennett *The Act Itself* Chapter 11.

¹⁴⁸ See Chapter 1 for a discussion of whether Aristotle's 'mixed actions' are a good example of DER.

¹⁴⁹ St Thomas *Commentary on the Nicomachean Ethics* p133.

How can this appeal to the plain or prudent man be helpful? I argue in §5 how this might be developed, and how might it constitute a useful approach to the problem of closeness. I go on to argue that the plain man thesis is better applied as a modification of or limit to how the options over which an agent exercises choice are conceived, and this can be understood in the context of cognitive virtue. This goes beyond conceptual conceivability. Conceptual conceivability (that is the 'first personal' desirability of an end and the means the agent takes herself to adopt in achieving this end) is without doubt a robust limit on intention, but it does not seem that we should consider this to be the only factor that determines the granularity of an agent's intentions. Bennett's 'plain man' will have a more restricted set of conceivable plan-proposals than what would be conceptually conceivable, or possibly conceivable by an agent that is unencumbered by causal and other factual beliefs.

The suggestion that the first personal practical reasoning version of DER (such as that espoused by Finnis) might render counter-intuitive judgments about cases (including the permissibility of craniotomy) is far from a knock down argument against DER (or Finnis' view for that matter). For one might think that on reflection the balance lies in favour of the truth of DER and that one ought to bite the bullet on cases of closeness, such as craniotomy, in the interests of following strictly what is intended. This kind of strategy for dealing with closeness cases is risky, not just because it does not resolve the tension, but because DER gains much of its general plausibility and

rhetorical force from its ability to explain intuitions. Indeed, the aim of the many attempted solutions to the problem of closeness is to account for our intuitions in these difficult cases, showing how double effect can work or be revised in accordance with intuitions in a theoretically reliable and psychologically plausible way. Perhaps because this approach ‘bites the bullet’ in analyzing craniotomy and the potholing examples as permissible, authors, including authors from the same Natural Law stable as Finnis, Grisez and Boyle, have continued to look for solutions to closeness.

§5.4 The hylomorphic approach.

Among those who think that we ought to look to an account of intentional action to help deal with the problem of closeness, a recent train of research¹⁵⁰ has argued for an account of action which is hylomorphic¹⁵¹, involving both the physical and intentional in their account of action, the physical and intentional being understood as the matter and form of an act respectively. An “act has a being, a nature and a natural order, such that *the act itself and its integral nature are always materially included within the*

¹⁵⁰ Steven Jensen *Good and Evil Actions* (Washington, CUA Press, 2010), Steven Long *The Teleological Grammar of the Moral Act*, (Naples, Florida, Sapientia Press, 2007) Matthew O’Brien and Robert Koons “Objects of Intention: A Hylomorphic Critique of the New Natural Law Theory” *American Catholic Philosophical Quarterly* (Fall 2012) Vol. 86, Issue 4, available online at http://villanova.academia.edu/MatthewOBrien/Papers/1562291/Objects_of_Intention_A_Hylomorphic_Critique_of_the_New_Natural_Law_Theory [accessed 31 May 2012]) and Nicanor Austriaco OP “Abortion in a Case of Pulmonary Arterial Hypertension” *The National Catholic Bioethics Quarterly* Autumn 2011 Vol II Number 3 p503ff.

¹⁵¹ They consider the origins of this thinking to be found in the “Thomistic commentatorial tradition” (see Austriaco, N. *Abortion in a Case* and Long, S. *The Teleological Grammar*).

moral object"¹⁵², thus the moral object is not "merely a proposal" which is adopted to achieve an end. In arguing for the hylomorphic approach, Long writes that: "To refuse to acknowledge that the physical structure of the act materially enters into the moral object of an act is pure angelism, a residue of Cartesian error. It is cognate with logicism in treating that which is natural as reducible to a cognitive entity."¹⁵³ The bold claim that advocates make to differentiate their theory from the intentional account is that the hylomorphic account of human action "acknowledges that persons live and act in a real world structured by cause and effect relationships."¹⁵⁴

As Nicanor Austriaco OP writes: "consider the naughty child who claimed that she did not intend to burst her brother's balloon when she pricked it with her mother's sewing needle in order to annoy her older brother"¹⁵⁵. The teleological move is to say that "the physical act of pricking a balloon with a needle is, by its nature, ordered toward the destruction of that balloon"¹⁵⁶. In this way, a solution to the craniotomy/hysterectomy problem emerges; the killing is understood to be part of the integral physical and teleological structure of narrowing a foetus' skull.

This goes further than claiming, as Anscombe does, that facts about one's circumstances constrain which descriptions one must admit are intended, because it posits that those circumstances include teleologically structured

¹⁵² Long *The Teleological Grammar* (my emphasis) p109.

¹⁵³ Long *The Teleological Grammar* p108.

¹⁵⁴ Austriaco N. *Abortion in the case of PAH*. p509, p511, see also fn22.

¹⁵⁵ *Ibid* p510.

¹⁵⁶ *Ibid* p511.

physical events, which are hylomorphically combined (or inseparably connected) with intentions in an action. An agent adopts this unity in its entirety when he acts in that way. ‘Teleology’ needs some further thought here, because in the hysterectomy case, the death of the foetus is also an integral part of the scenario – it is a causally inextricable result of the means to save the mother (the foetus could be saved if it were older, in the same way that the foetus in the craniotomy could be saved if restorative foetal skull surgery were further advanced).

This approach provides a way to bind an agent’s intentions to close effects that might not be part of the agent’s first personal view of their plan. In doing so by way of a hylomorphic combination of intentions and physical and teleological structures found in actions, this approach raises a number of further questions. How much of the teleological structure associated with intended means should count as combined with the agent’s intention hylomorphically? The physical ramifications of our actions are very extensive, and even if we find a way to read goal directedness into physical actions without the use of intention, there will be a scoping problem. Also, if we are not relying on practical reason to identify the salient descriptions of an action, we may have difficulty identifying which physical teleologies are to be combined with an agent’s intention. Sticking a needle in the balloon might be “by its nature ordered towards” many further effects: destroying the balloon, causing a popping noise, slightly blunting a needle, and even ordered towards what we might consider as more remote effects, such as polluting the ocean (or landfill), etc. Another way to express this objection is

as an epistemological concern over which physical teleological features ought to be included within the moral object, if practical reasoning is not the guide.

There is a significant strand of thought among authors¹⁵⁷ who favour a hylomorphic account of action, that argues that social, psychological and circumstantial factors should be incorporated in the formation of intentions, and as ‘material’ part of an action’s substance. They appeal to the concept of a practice¹⁵⁸ (such as Medicine) and the socially constructed nature of the way agents think about cases to provide an important element of their response to closeness cases and the perceived problem with Finnis, Grisez and Boyle’s approach. It is not clear, however, whether in these cases it is the hylomorphism or conclusions drawn from conceptions of practices or social construction that are doing the work of providing a response to the problem of closeness. As I argue below, this way of thinking can be separated from hylomorphism and developed into a less metaphysically exotic approach to the problem of closeness.

§5.5 A practical proposal

One of the problems of the first person practical reason account of intention (such as that advocated by Finnis) identified by the proponents of the hylomorphic approach is that it involves too weak a connection between

¹⁵⁷ Including Jennifer Frey and Matthew O’Brien.

¹⁵⁸ in a broadly MacIntyrean sense.

agents' possible plans and reality¹⁵⁹. This can be understood in terms of the fine granularity of a 'conceptual conceivability' approach to intention. The thought is that it might be possible for someone to conceive of themselves as merely making a hole in an inflated balloon with a pin, or that "“I am merely moving a knife through such-and-such region of space” regardless of the fact that the space is manifestly occupied by a human neck”¹⁶⁰ however, for anyone who is a competent (and honest) agent, this just is “bursting the balloon” and is *ceteris paribus* “injuring a person”. While the teleological/hylomorphic account seeks to anchor plans to the real world in the inherent teleology which “orders physical acts towards” an end, one might hold that one's planning (and direct intending) is constrained to include those things which are believed to be instrumental to the plan¹⁶¹, and that there are constraints on the descriptions under which our action is intentional which come from the way we conceive of plan-proposals (that is, the practical options before us) as opposed to logical or conceptual conceivability. So, some of the things believed to be instrumental might not be instrumental, but closely united with them in the agents' understanding, which is formed by social, psychological and circumstantial factors, and includes the way shared practices such as medicine form that understanding. Some descriptions under which an act may be described are bundled together by this *practical conceivability*. I differentiate 'practical'

¹⁵⁹ That is, a difference between the action that one merely conceives of oneself as performing, and the action that one is 'really' doing.

¹⁶⁰ Anscombe, “Action, Intention, and Double Effect.”

¹⁶¹ I use “instrumental to” as opposed to something being a “necessary part of” a plan to achieve an end, since this will help to maintain a distinction between the hysterectomy and craniotomy cases.

from 'psychological' conceivability in order to capture the necessarily outward and experience based perspective that people qua agents, require.

Practical conceivability can be developed further, and since it is normative and plans can be better or worse suited to reality there is an opening for virtue.¹⁶² A norms-of-conceivability approach is likely to find support from some modern forms of virtue ethics. Hursthouse writes of virtues being multi-track dispositions: "A virtue such as honesty...is far from a single track disposition to do honest actions, or even honest actions for certain reasons...it is concerned with many other actions as well, with emotions and emotional reactions, choices, values, desires, perceptions, attitudes, interests, expectations and sensibilities. To possess a virtue is to be a certain sort of person with a certain complex mindset"¹⁶³. Furthermore, "Some recent thinkers including Lawrence Blum [Blum *Moral Perception and Particularity* and John McDowell [McDowell "Virtue and Reason" *the Monist* 62], have stressed the *cognitive* aspect of virtues in helping agents to recognize morally salient features of their situation and see what is at stake more clearly"¹⁶⁴. Just as perceptual content is conceptual 'from the ground up' (see McDowell) one can argue that actions are, to some extent, coarse grained/normative from their conception and imagination onwards.

¹⁶² Which is tied in other ways to double effect (see Chapters 1,2 etc).

¹⁶³ Rosalind Hursthouse (2012) "Virtue Ethics" Stanford Encyclopedia of Philosophy [plato.stanford.edu/entries/ethics-virtue] accessed June 2015.

¹⁶⁴ Zaborowski, H. *Natural Moral Law in Contemporary Society* (CUA, 2010) p105.

There could be failures in this practical conceivability - it would be practically negligent or some form of mistake, not to associate moving one's finger on the trigger of a loaded gun with firing it, or suddenly making a hole in an inflated balloon with bursting it. But 'associate' here is too weak – there is a normative force inclining us to think of them as 'tantamount' to the same thing or two true descriptions of the same action, other things being equal. This understanding of conceivability could be used as an answer to the problem of the craniotomy case for a first person account by saying that killing is practically conceived as the same thing as crushing the skull and removing the brain of the foetus. We can regard experienced doctors, due to their experience and the norms of the practice of medicine to find it very hard to regard the practical plan involved in a craniotomy as anything other than an instrumental killing, a killing in order to save.

This practical conceivability account ought to be seen as a modification of the first person practical reasoning account, rather than as a version of the teleological account (even though there are elements of it in some hylomorphic literature). This is because the metaphysically more complicated (and it can be assumed more controversial¹⁶⁵) theoretical elements are not a necessary part of this argument. Norms of conceptualization, characterisation and psychology of action provide resources to question the kind of conceptual distinctions necessary for Finnis' account to render craniotomy permissible. Tying “actions to the real

¹⁶⁵ As per Ockam's Razor.

world” appears necessary to account for our intuitions in the craniotomy case, and in this way it is hoped that a first personal account may not have to bite the bullet and accept the permissibility of craniotomies.

This is not un-problematical. To begin with, I have argued that a psychology of action which limits/bundles together the descriptions under which one performs an intentional action could solve a problem for a proponent of the first personal view, but I have not shown (beyond the appeal to intuitions) that such a moral psychology is evident.

One might think that in the course of avoiding mere psychological conceivability, which could vary widely between people, relying on practices and cognitive virtues to secure what is conceivable is not robust enough to anchor craniotomy to killing, since practices may change over time and any particular action may be considered as part of a number of practices.

However, craniotomy and killing should not be *too* firmly connected since if medicine advances to a stage where the foetal life can be saved, the practice will revise the practically conceivable. I take it that an action may be part of a number of practices, but do not see this as a serious objection to the account sketched here, because common across all practices will be shared understandings of cause and effect, based on the necessarily shared features of action and expectation.

Another objection might be that if the work is being done in this account by the practical inconceivability of the separation of the killing from the

craniotomy, then the same may be true of the hysterectomy case. Some people, doctors (or indeed mothers) may not be able to see a difference between killing the foetus and hysterectomy of a gravid uterus. In this case, the importance of the instrumental part that killing plays if the act is to be impermissible might be underlined. Where killing is practically conceived of as instrumental to the achievement of the end, then the means condition of double effect is violated¹⁶⁶. In the hysterectomy case the death appears in the plan as an undesired outcome rather than an instrumental step. There remains, however, a fundamental difficulty in navigating the fine line between an account that is too permissive and too restrictive, and this, I suggest, is best handled through a theory of virtue based analysis, which includes intellectual, practice based aspects and sensitivities, rather than through a more formulaic approach.

A possibly serious objection can be generated from Anscombe's view that answers to 'why?' questions are how the descriptions under which acts are intentional are identified. It is clear how the 'radically' first personal intentional account fits in with this test, since agents conceive of their means as desirable because it achieves their end, and this description cannot fail to appear in a truthful and coherent means/end story elicited by appropriate questioning. The practical conception view is challenged because if the description of the means under which it is desirable is 'bundled' with a description of the means that is undesirable, it would be possible for both

¹⁶⁶ The question of exactly why instrumental choices can be morally determinative, and known outcomes of actions which feature in the reasoning about those actions are not crucial in the same way is an interesting one which is considered in Ch 1 and 4.

agent and questioner to circumvent this undesirable description, and still find a satisfactory account of the means end reasoning through 'why?' questions. A potential solution to this would be to think of the dialectic between the agent and the questioner as more than just a one-question-and-one-answer encounter. The questioner may recognise that an answer under-describes an act or means, and while the under-description provides a sufficient explanation of the means/end reasoning, it is not an adequate account of a practical conception of what was done. A precocious child may say that they made a hole in a balloon in order to annoy their sibling¹⁶⁷, but the questioner (and the child) will have a practical conception of suddenly making holes in inflated balloons which closely ties sudden-holes-in-inflated-balloons to bursting.

We should question the idea of a practice, introduced by some authors to explain why descriptions should be bundled together. In particular, how strongly associated one person might be with the thinking associated with a practice. How easy it is to avoid the practical conceivability involved in a particular practice? If it's possible to think or train oneself out of the way of understanding involved in the practice, then it will not be a robust resolution to closeness problems. If it is not possible to avoid the concepts binding descriptions of actions together oneself, then it might be possible to recruit someone from outside the practice to 'do the dirty work', without their forming the relevant wrongful intention. Both of these possibilities, I

¹⁶⁷ Austriaco, N. *Abortion in the case of PAS* p510.

would suggest, would be unacceptable, in the first instance because it is not clear how helpful a defeasible psychological association between two descriptions of an act would be in resolving closeness, and in the second because it raises a host of other moral questions, since presumably we do not think that the prospect of recruiting people who do not know or realise what they are doing (because they do not share the same practice based understanding as us) is an acceptable way to ensure that harmful intentions are not generated.

One possible objection to modifying the first personal practical reasoning approach to include a consideration of practical conceivability is that only a fine-grained way of understanding intention can do the job needed in double effect cases. The threat of a coarse grained approach to intention is that it may fail to make just the kind of distinctions we ask DER to make.¹⁶⁸ Though the hysterectomy/craniotomy case is more controverted, there are plenty of standard examples, such as the submarine captain who closes the bulkhead door in order to save the ship and who does not intend the deaths of those stuck in the flooded part of the submarine, where fine-grained intentions make all the difference.

I am not sure that the introduction of practical conceivability necessitates coarse-grained intentions. What an agent intends can be extremely fine grained, and differentiated from what she foresees, while at the same time

¹⁶⁸ I am grateful to Dr Joseph Shaw for emphasizing this line of argument in responding to the presentation of an earlier version of this Chapter at a symposium on Double Effect Reasoning organized by the Anscombe Bioethics Centre and held at Blackfriars, Oxford.

being influenced by what the agent understands to be practically conceivable. It is plausible to understand that the submarine captain closing the door to a flooded compartment does not involve the deaths as either her means or end. Some descriptions of what he does might be close to killing the sailors, but from his point of view, what he does (closing the door) is separable from the deaths. This is in contrast to the craniotomy case, where there may be more reasons to think that (from the doctor's point of view) they will need to be performing some kind of mental gymnastics not to see crushing the skull just as killing. What I want to claim is that it is not obvious that the doctor is entirely free to believe that narrowing the head is all they are doing when they choose the means to save the mother. If they are not free in this way, then there are limits (other than conceivability) to what the doctor could be intending.

It is, even taking into account practical limits on what could be conceived, hard to resist the possibility that the doctor need not choose the child's death as a means to saving the mother. If it is possible (as well as conceivable) that a doctor does not choose the death of the child in a craniotomy case, then this question of practical conceivability may suggest that it might be difficult for doctors (and the rest of us) to make this specific kind of choice, and form this extremely fine grained kind of intention. As a solution to the problem of closeness, if practical necessity cannot establish that the craniotomy involves an intention to kill, then it at least explains why many view the craniotomy case as having such force as an action close to and tantamount to killing.

If the stronger version of my practical conceivability argument (that it would be impossible for a doctor, given current medical science, not to intend the death of the child whose skull they crush) proves not to be sustainable, we might still think that medical norms, the practice of medicine and the way we typically understand what we are doing plays an important role in how we form and deliberate about possible intentional actions.

§5.6 Wedgwood on closeness

So, the prospects for a first personal approach to intention to solve the problem of closeness are limited. Ralph Wedgwood seeks to solve the problem by identifying criteria for identifying bad states of affairs that should not be intended. He suggests a proponent of DER ought to accept that one only intends the collision and not the death in the bridge/fat man case; and that one intends the only blowing up and not the death of Foot's exit blocking potholer. He suggests that this should not be seen as a problem or embarrassment for DER, because the collision and the explosion are 'bad states of affairs' in the sense relevant for DER's intention criterion. These bad states of affairs can, argues Wedgwood, be distinguished from the trolley case, where the train car is diverted from five towards the one.

Wedgwood's proposal is that "for a state of affairs S to count as a bad state of affairs in the relevant way is for the following two conditions to be met: first, a virtuous agent, guided by her knowledge of ... true *ceteris paribus* moral generalisations [such as the generalisation that other things equal, and under normal conditions, when a collision between a person and a fast-moving railway trolley occurs, the person suffers serious injury or even death as a result], would form the kind of expectations about S that would lead her to view it as bad news in this way; and secondly, in this particular case, these expectations are borne out – that is, things turn out badly in more or less the very way in which S would lead such a virtuous agent to expect them to."¹⁶⁹

This solution to the problem of closeness is neat, because it gives a tool for difficult cases that may well coincide with widely held intuitions, since it is assumed that those intuitions are reliable, or persuasive, and are those of virtuous agents. It is therefore a more sophisticated version of Bennet's 'plain man' quasi-solution, because rather than leaving us to wonder why a 'plain man's' opinions might be important, Wedgwood points the way towards virtue. Some might argue that virtue is no more helpful than plainness, but it does at least involve normativity in the context of seeing and interpreting events, rather than mere popularity. Wedgwood's attempt to tie a feature of action planning down to wider normative standards, that is, whether a state of affairs should be seen as good or bad based on moral

¹⁶⁹ Ralph Wedgwood, "Defending Double Effect," *Ratio* 24, no. 4 (December 1, 2011): 384–401.

generalisations and virtuous reasoning, and therefore whether outcomes count as means or side effects, provides DER with a more nuanced application (though it may cast aspersions on those who in the end deny the force of the intuitions).

DiNucci objects to this approach on three grounds¹⁷⁰. Firstly using the expectations of virtuous agents to determine bad states of affairs cannot account for ‘freaky accidents’, which would not count as bad states of affairs. Secondly, DiNucci pushes Wedgwood on the closeness of his virtue-generalisations. This second objection is much more persuasive than the first and will be considered below. In response to the first, in this context Wedgwood need not account for the badness of freak accidents. As far as I can see he does not need to offer a general theory of normativity via the expectations of virtuous agents (or virtues themselves, which would be the claim of some virtue ethicists), just a theory that is good enough for prospective action planning. While a general theory would need to account for the badness of freak accidents, it would be extremely odd for someone to avoid, say, playing table football because of the remote chance of injuring their foot. In terms of their practical deliberation, we do not need to count table football as a risky game for toes.

DiNucci’s second objection is effectively to say that the problem of closeness still applies, but to the generalisations, rather than to actions. Wedgwood is

¹⁷⁰ DiNucci, *Ethics Without Intention*.

committed to the claim that the standard trolley case is permissible, because switching the points towards the siding is not 'bad news' in the way that pushing a fat man off a bridge in order to stop a trolley is. The objection is that we know there is a person stuck on the siding, so why not include this in the state of affairs that is to be judged by the virtuous agent? "Without criteria for the inclusion of the victim in one description and exclusion of the victim from the other description, we are back at the beginning."¹⁷¹ Merely stipulating the criteria for including the death would be question begging, and he writes that Wedgwood does not offer any other criteria.

This helpful objection encourages a focus on action description, since even if virtue based *ceteris paribus* moral generalisations help us to distinguish acts that count as the execution of a bad intention (because virtuous agents expect them to cause bad states of affairs), from states of affairs that merely have bad consequences, this does not involve *criteria* for distinguishing effects that ought to be included in an act description from effects that need not.

One promising move is to use the virtuous agent again, and deny that such criteria could be reliable. DiNucci writes that there are only three options for someone who wants to address problem of closeness. Firstly one could abandon DER, secondly find criteria or thirdly question the intuitions that set up the problem in the first place. However, this does not provide an

¹⁷¹ Ibid. p126.

exhaustive list of the options available, since a solution to the problem need not be definitive for every possible scenario.

Wedgwood's approach is not absolutist, and while he distinguishes the standard cases in the same way as a traditional proponent of DER, he writes that "in cases in which an agent successfully executes a bad intention of this sort, then, according to [DER], there is a stronger reason against the act than there would have been against an otherwise similar act that is not done with this bad intention."¹⁷²

This 'bad states of affairs' approach does not translate easily into a solution to the problem of closeness for traditional/absolutist defenders of DER. This is because rather than it being harder to justify intentionally causing bad states of affairs, DER is understood to judge some intended actions as impermissible. Abandoning the close connection between exploding and killing, or the collision and killing as an explanation for what makes the exploding and colliding wrongful in favor of the more general *certeris paribus* moral judgments of virtuous agents moves away from one of the traditional starting points of DER, and one of the most significant elements in its development (see Chapters 1 and 2). Closeness is a particular problem for these theories/theorists because it is not just that some bad states of affairs need stronger justification if they are to be intended, but that some actions (paradigmatically, killing the innocent) are always impermissible,

¹⁷² Wedgwood, "Defending Double Effect."

whereas other close actions are not subject to the same explicit prohibitions. As argued above in sections 5 and 6, a virtue based practical conceivability approach to an agent's options bundles some close actions with morally prohibited actions, in a way that is sensitive to social, psychological and circumstantial factors, and therefore, it is argued, better equipped to deal with intuitive judgments about marginal cases.

§5.7 Close acts, or close prohibitions?

Some authors have responded to the problem of closeness by appealing to a more broad set of moral concerns that ought to be applied to the closeness cases. Rather than sailing their account of intention closer to the wind of foreseen effects, they choose to change tack and look for another approach, involving prohibitions other than killing. Rather than refining our view of intention, and rather than biting the bullet on craniotomy type cases, they suggest that in closeness cases we focus too narrowly on killing, and that other prohibitions might explain the intuitive impermissibility found in close cases. Across the literature the debate over DER is almost exclusively couched in terms of killing and the circumstances in which causing death might be permissible. This is understandable because of the wide agreement that if any action falls under an absolute prohibition, killing the innocent is a prime candidate. This may have distorted the discourse to make DER seem to be about killing. If DER is a good account of how we ought to understand

the ethics of action planning, then it will apply much more broadly than just to killing.

Helen Watt offers one way to distinguish closeness cases such as the trolley/fat man according to our intuitions¹⁷³; she argues that moral norms that are closely related to those which prohibit killing the innocent prohibit harmful bodily invasions of them. Granting that a doctor might not intend (in the strict sense) the death of the child in the craniotomy case, he will still (have to) intend some invasive effect on the body of the young child if his further intention of saving the mother is to be effective. This is a neat move, as it does not depend on metaphysics or on a reliance on cognitive virtues providing norms of practical conceivability which may be hard to pin down.

I am sympathetic to this approach, and agree that the double effect literature's focus on killing can be unhelpful in practical scenarios. A right not to have one's bodily integrity deliberately and lethally invaded does seem to provide a basis on which the cases can be distinguished morally, since the intervention is directed at, on the one hand, the mother's uterus and on the other, the foetus' cranium. This approach provides an independent reason to differentiate between the hysterectomy and the craniotomy that does not depend on an account (metaphysically exotic or otherwise) of intending to kill. In the craniotomy case, the bodily invasion

¹⁷³ Watt, H. *Beyond Double Effect: Side-Effects and Bodily Harm* in Oderberg, D.S. and Chappell, T. (eds.) *Human Values: New Essays on Ethics and Natural Law* (Basingstoke, Palgrave Macmillan, 2004) p241.

(that is known to be lethal) is subject to a prohibition and this prohibition is closely related to the prohibition on killing.

There are, however, some challenges. It would be implausible to think that all intended bodily invasions are impermissible, since that would rule out standard cases of curative surgery. So, in this case the connection between intended bodily invasion and foreseen death is important. Watt writes that “what makes the action wrong [in a craniotomy case] is that the intention to invade the victim’s bodily “space” is coupled with the knowledge that this will not promote, but will instead destroy, the bodily functioning of that person.”¹⁷⁴.

One might think that it is the ‘lethal’ aspect of the bodily invasion that is doing the moral work in establishing impermissibility. In other words, an appeal to the prohibition on killing is being smuggled in behind a prohibition not to invade bodily integrity. However, in both the craniotomy and hysterectomy cases there is lethal action. Watt’s extra prohibition account differentiates the cases on the basis of the bodily invasion (of the child), rather than on the basis of foreseen death or an intention to kill, which we can admit might not be present in either scenario. So, her position should not be vulnerable to this objection.

¹⁷⁴ Watt, H. Letter to the Editor “The Problem of the Innocent Threat” *NCBQ* Spring 2012.

There are further challenges. Watt's account is helpful, but the extent to which it is a good solution to the problem of closeness (as opposed to a promising way forward for the craniotomy case) is not straightforward. Might there not also be closeness problems for prohibitions other than killing?

In the craniotomy case, it is plausible to believe that the doctor does not intend the death of the foetus, and that what he does is close to but not deliberate killing. Is it really plausible to believe that the doctor does not intend a lethal bodily invasion? This does seem to be a necessary part of his plan; something the doctor believes to be instrumentally important to achieving his end. If he had no such intention, then the coherency of his plan may be called into question.

So, one possibility open to Watt here is to shift the burden of a resolution to the closeness problem to the agent who has to determine which prohibitions are pertinent to their plan, given what they are trying to do. Relying on our abilities to understand and apply moral considerations to what we are planning on doing is much more appealing than trying to establish precise criteria for an application of intention that goes beyond a first personal view. This may not satisfy someone looking for a robust resolution to the problem of closeness, but it is the most promising way forward.

§5.8 Concluding remarks

The problem of closeness is subtle and persistent, but I have argued for a two part approach. A first person, practical reason account is the most plausible approach to intention as we have seen in previous chapters. I have tentatively suggested that the way we conceive of plans and the options we see as realistic, may be affected by practices (e.g. medicine), social and circumstantial factors. This is a resource that proponents of the first person approach to intention do not deploy, but that might be taken to blunt the force of the problem of closeness for their view. This approach however, on its own, does not provide a robust enough account of what we can intend to settle controverted examples.

Finally I have argued that Watt's inclusion of related prohibitions does make promising headway in closeness cases. It suggests that we ought to attend to a wider set of morally salient features of cases, rather than trying to distort our view of intentional killing to include all manner of 'close' actions. Rather than closeness being a fundamental problem for an account of morality that involves intention, closeness shows that there may be many different considerations in difficult cases that agents ought to attend to.

Chapter 6 Intention Double Effect and the Law

§6.1

The line of reasoning presented in the previous chapters focuses on defending double effect reasoning against criticisms relating to intention, the 'core' of DER. The positions taken in defence of DER have implications for debates around the use and implementation of DER. This is what I explore in this chapter in relation to the law, and the debate over end-of-life decision-making. The contribution this chapter stands to make is where if it turns out that writers in these areas lean on arguments that deploy mistaken understandings of DER, or if they take DER to be weaker than its position in the law may be.

If the arguments of previous chapters stand their ground, then DER survives as a defensible position that moderates the application of absolute moral norms. When considering the norm against killing, DER provides a guide as to whether an action is permissible in respect of that prohibition. This is a development of DER that allows it to address closeness cases because close cases may be subject to close prohibitions. In this way, we are not tempted to stretch our concept of intention too far, nor tempted to abandon positions that rely on the fine distinctions that a proper understanding of intention allows us to make (e.g. in double effect cases). The defence of DER also retreats from the view that DER provides all-things-considered judgments of permissibility. This is preferable not only because the use of DER needs to

be understood and applied in respect of particular prohibitions (in order for us to examine whether our proposed or completed intended action falls under relevant proscribed category) but also because DER cannot easily take into account cases of recklessness or negligence. More on this below. I have also argued that using DER as a moral heuristic may be misleading for a number of reasons, but in particular because singling out intention might lead us to think that we can choose what to intend based on the desirability of having the intention. This mistaken view has led to objections to DER on the basis that intention can be 'gerrymandered', and that DER provides reasoning that in effect supplies a 'get out of gaol free' card to anyone who can manipulate their intention or who can tell a plausible story of innocent intentions. This obviously has relevance to the law.

There are challenges in applying DER to the law, and in tracing the ways in which DER might usefully be deployed in legal reasoning. DER appears to be part of the law in one form or another, though this is relatively inchoate, and open to interpretation. I consider this below, but to begin with, it is worth highlighting a tension in applying DER to the law. On the one hand the law needs to be clear, provide workable guidance and be enforceable, but on the other hand, the philosophical literature most often introduces DER in order to deal with hard cases. These cases are developed and discussed precisely because the application of DER is difficult in order to test the limits of theory.

An emphasis on philosophical problems associated with DER may encourage lawyers unfairly to dismiss DER as too conceptually confused or unworkable. The project of unpacking the detailed conceptual implications of DER is extremely complex, and the subject of a very wide literature, but this should not be taken to undermine the central set of claims around DER (suitably adapted for legal contexts), which are much less legally controversial. A legal difference between tactical and terror bombers based in part on an agent's attitudes and plans, does not need to involve a fully developed DER theory that has resolved the most prominent objections to DER (such as the problem of closeness). A more philosophically robust theory of DER will provide a more satisfactory foundation for the legal distinction, but the philosophical literature tends to focus on conceptually difficult hard cases. Following the old adage that "hard cases make bad law", we have good reason to be cautious of conclusions that are drawn from philosophical complexity.

A series of recent papers have argued about just this kind of point¹⁷⁵. This chapter is a contribution to that dialogue. Recognising that the application of DER to hard cases may be disputed even among those who favour DER as a workable normative approach, DER should not be disqualified from the

¹⁷⁵ See for example, Charles Foster et al., "The Double Effect Effect.," *Cambridge Quarterly of Healthcare Ethics : CQ : The International Journal of Healthcare Ethics Committees* 20, no. 1 (2011): 56–72.; Andrew Mcgee, "Intention, Foresight, and Ending Life," *Cambridge Quarterly of Healthcare Ethics* 22, no. 01 (2013): 77–85; S Duckett, "Knowing, Anticipating, Even Facilitating but Still Not Intending: Another Challenge to Double Effect Reasoning," *Bioethical Enquiry* 15 (2018): 33–37; Richard Huxtable, "Get out of Jail Free? The Doctrine of Double Effect in English Law.," *Palliative Medicine* 18, no. 1 (2004): 62–68; Anna Lindblad, Niels Lynøe, and Niklas Juth, "End-of-Life Decisions and the Reinvented Rule of Double Effect: A Critical Analysis.," *Bioethics* 9702, no. 7 (2012): 368–77.

courtroom, as Foster et. al. suggest¹⁷⁶. There is no guarantee that disputes among philosophers about hard cases means that the underlying theory is not useful, the best available, or clear when applied to ordinary cases. Another way to put this might be to say that philosophical complexity does not necessarily cash out into or entail legal complexity.

As we shall see, the Law can deal with difficult cases in a number of ways, and they do not need to be methods that will satisfy philosophers. For example, we might take it that one role of the courts is to provide a way to manage difficult situations on a case by case basis, interpreting statute and precedent, and developing them where necessary.

This chapter relates double effect, as outlined in the previous chapters, to the debate over euthanasia and assisted suicide and considers its use in the law (predominantly English law). It proceeds in three parts, firstly in relation to DER's appearance in the law, and the ways in which we might expect DER to be applied differently in legal contexts. The second section considers DER's application to end of life care, given that end of life care is one of the central or paradigmatic cases where DER is applied, and if DER is not applicable here, we would have good reason to doubt its applicability across other legal and regulatory fields such as dilemmas at the beginning of life, the ethics of warfare, cooperation with wrongdoing and so on. The final section considers a version of the problem of closeness found in legal

¹⁷⁶ Foster et al., "The Double Effect Effect." p69.

contexts that has been used to challenge DER. Two arguments are proposed to resolve this kind of challenge, one legal and one that relies on DER.

Philosophical criticisms of double effect, including some of those considered in previous chapters that DER permits too much or too little, that it is not specific enough or that it is too open to abuse, are reflected in the law via relevant cases and in the jurisprudential debate. These difficulties with motive, intention, foresight and the disputed nature of criminal acts have led some to argue that in some areas the law has “an obligation to be philosophically lax...[and that DER should be] safely penned in the philosopher’s lecture room”¹⁷⁷. I argue on the contrary that if double effect and its elements are part of how actions ought normatively to be understood and evaluated, then there will be a natural home for double effect in the law, which also deals with an agent’s responsibility for actions and outcomes.

§6.2 DER and Case Law - *Bodkin Adams*.

Judge Devlin’s famous direction to the Jury in *Bodkin Adams* (1957) has been widely cited as the occasion double effect was introduced into English Law¹⁷⁸.

¹⁷⁷ Ibid. See also Saini P. “The doctrine of double effect and the law of murder *Medico-Legal J* 1999; 67” 106-120

¹⁷⁸ See House of Lords Select Committee on Medical Ethics. Report of the Select Committee on medical ethics 1994, HL Paper 21. London: HMSO, 1994 Also, *R v. Bodkin Adams* [1957] *Criminal Law Review* 365 cited by Foster et al. *The Double Effect Effect*.

A direction to the jury should be understood in its legal context. The judge in directing the jury draws attention to the salient aspects of the case and the law, trying to eliminate or avoid unhelpful distractions such as assumptions the jury might make or potentially misleading legal terminology. The judge expresses what the law is and does not usually form new aspects of it. This is the relevant part of Devlin's direction:

“[the doctor] is entitled to do all that is proper and necessary to relieve pain and suffering, even if the measures he takes may incidentally shorten life.¹⁷⁹

It is noteworthy that he goes on to explain this statement, which appears to be a good and clear example of DER in these terms:

“That is not because there is any special defence for medical men; it is not because doctors are put into any category different from other citizens for this purpose. The law is the same for all, and what I have said to you rests simply on this: no act is murder which does not cause death. “Cause” means nothing philosophical or technical or scientific. It means what you twelve men and women sitting as a jury in the jury box would regard in a common-sense way as the cause. If, for example, a doctor had done something or omitted to do something and death occurs, say on ... the Monday instead of the

¹⁷⁹ *R v. Bodkin Adams* [1957] *Criminal Law Review* 365.

Tuesday, no one with common sense would say the doctor caused death. They would say the cause of death was the injury, or whatever it was, that brought her to hospital.”¹⁸⁰

Firstly we might note that this is a case in which DER could be employed. ‘Incidental’ effects are those that accompany or are secondary to another action, and so can reasonably be understood as side effects to what is the ‘proper and necessary’ action of relieving pain.

There are however, some unfortunate confusions here. The characterization of an effect as incidental does not necessarily mean that it is unintended, but I think in this context it is safe to assume that an incidental effect would not be intended, particularly if we take incidental to mean incidental to the doctor’s plan. Further, claiming that “no-one with common sense would say the doctor caused death” because their demise was imminent is unhelpful, and a misleading way of implying that the doctor could merely have foreseen the death being the ‘incidental’ result of measures to relieve pain.

The explanation of this DER example in terms of causation is curious, and leads Foster et. al. to the view that Devlin is not referencing DER here. It is true that Devlin does not mention the doctrine explicitly, and it is also true that he does not mention all of the four conditions that usually constitute DER, but neither of these omissions nor the explanation in terms of whether

¹⁸⁰ *R v. Bodkin Adams* [1957] *Criminal Law Review* 365 cited in Foster et. al. *The Double Effect Effect*.

the doctor or disease causes the patient's death warrant the view that double effect is not at play here. As noted above, a Judge's direction to the jury is intended to focus the Jury's attention on the most salient aspects of law in relation to the case at hand. It is fair, then, for the Judge to paraphrase a theoretically complicated approach to the case, which might lead jurors down an unhelpful path of deliberation. There are important philosophical differences between intention, knowledge, desires and motives, and between these mental features and causation, but while these are important for double effect, there may be good reasons for the law to gloss over them, for example, in the way Judges direct juries or in the criteria for assessing intent.

This being said, that DER is in the background, it is worth attending to the foreground: it is not clear that the explanation in terms of causation is a helpful stand in for double effect. If we are to understand an account of causation as doing the moral work here, so that the disease and not the doctor kills the patient, then, as Foster et.al. argue, this explanation is not consistent DER. If the argument runs along the lines that one does not cause, and therefore is not responsible for causing death if death is imminent anyway, then all kinds of pre-emptive killing¹⁸¹, intended or otherwise, would be permitted.

¹⁸¹ The killing could fall foul of all of the conditions of DER and still not be 'the cause' on this account.

§6.3 Scope of DER within the law.

The central distinction found in double effect between intent and foresight is complicated in the law by a number of factors. Firstly, the precise relationship between the law and morality (that is, the philosophical normative ethics of which DER is a part) is controversial. The law may or may not have a foundational basis in morality, but for our purposes we need only note that they are different disciplines, with different aims or ends.

Setting aside some important legal questions such as how fine grained a law ought to be for the moment, the focus here will be on whether there is good reason to include intentions in the definition of criminal behaviour. The focus is on criminal behaviour, because this matches best with the philosophical literature. It should be noted, however, that in other areas of law intention can play a significant role in making an otherwise lawful act unlawful.

Treason in the US requires acting with the purpose to aid the enemy, not merely with the knowledge that this will result from one's action¹⁸². The case of a sniper foreseeably giving away their position when shooting at the enemy does not make them treasonous, even though what he does (shoot at the enemy) also aids the enemy in making it easier for them to find him.

¹⁸² Wayne LaFave, 1 Subst. Crim. L. § 5.2 (2d ed.) (footnote 9)

Also, harassment, false incrimination, hindering apprehension or prosecution and crimes of 'improper influence' involve a requirement of having a particular purpose.

There is also reason to think that English tort law also makes use of intention¹⁸³. English law "claims not to recognize the principle that an intent to injure is sufficient to make unlawful an otherwise lawful action"¹⁸⁴, however Finnis writes that this is undermined by case law in relation to e.g. fraud, and where agreements to act in a way that harms the plaintiff are made with the predominant intention to harm. This is considered a tort even the act in question would otherwise be lawful.¹⁸⁵

These examples are helpful in that they show that intention can be incorporated into or be part of legal concepts. There is a further question as to the extent to which the distinction between intention and foresight, which as we have seen can result in very fine distinctions between acts that appear similar, might be helpful.

The law will be concerned with clarity (so that the law can be understood widely), fairness (so that judgments are consistent), with punishment, public safety, and forensic analysis (determining what happened). This last

¹⁸³ This position has changed since the 1890's, but recent judgments support a role for motive/intention. See Finnis, J. "Legal Reasoning as Practical Reason" in *Reason in Action Coll: Volume 1* (Oxford, OUP, 2011) p226 fn24 and Keith N. Hylton, Intent in Tort Law, 44 Val. U. L. Rev. 1217 (2010).

¹⁸⁴ John Finnis, "Legal Reasoning as Practical Reason," in *Reason in Action* (Oxford: Oxford University Press, 2011), 212–30, doi:10.1093/acprof:oso/9780199580057.003.0015.

¹⁸⁵ Ibid. p226 fn24

concern is important, because trying to work out after the fact whether an agent broke the law is a different endeavor to the philosophical project of developing clear and applicable normative concepts. The particular purpose and end of legal *reasoning*, which may or may not include double effect, is technical. It is concerned with “the resolution of disputes (and other allegations of misconduct) by the provision of a directive sufficiently definite and specific to identify one party as right (in-the-right) and the other as wrong (not-in-the-right)”¹⁸⁶. All of these mean that we should not necessarily expect double effect to show up in exactly the same way in the law as it does in normative philosophical literature. It may be that double effect needs to be re-interpreted in the context of the law, or that various considerations need to be taken into account before the role DER might play becomes clear.

A good example of this difference in scope between the law and morality is that the law needs to form specific judgments about actions and events that have occurred. When the inescapably forensic nature of court cases is combined with the ‘mental’ element of a crime, the jury will be in the business of attributing mental states to the accused (and, perhaps, to others who might not even be present during the trial). This raises a special set of problems concerning our ability to assess others that have caused some to criticize double effect¹⁸⁷.

¹⁸⁶ Finnis, J. “Legal Reasoning as Practical Reason” Part two, Collected Works p220.

¹⁸⁷ Garcia Double Effect in Reich W.T. (ed) Encyclopedia of Bioethics Vol 4. New York, Macmillan, 1995 and Quill TE, Dresser, R, Brock DW, “The rule of double effect: a critique of its role in end of life decision making New Engl J Med 1998 337[24]: 1766-1771.

If DER is taken to be a good defence for someone who causes harmful outcomes, then it might be open to someone to claim that they had good intentions (and satisfied the other conditions), while in fact they had wrongful intentions. They might also be able to construct a plausible, innocent but false story of what their intentions were, which would be particularly difficult for the court to discern if the outcomes are ones that could be the effects of both good and bad intentions (e.g. palliative care and euthanasia). In this sense DER has been accused of allowing suspects to ‘get out of gaol free’.

The question of how agent’s plans ought to be described was considered in Ch5 on closeness, but I only briefly considered the issue of an agent who might deliberately be misleading about a plan. My position here is that this cannot be a reason to challenge DER, nor DER’s use in the law. This kind of challenge should be put aside because this is exactly the kind of task that juries are charged with. Even though there are epistemic challenges in establishing what someone intended, and ‘folk’ understandings of intention that may carry implicit moral significance¹⁸⁸, juries are employed to decide one way or the other on this kind of contested question. If a person’s mental states are essentially opaque, then the law would have a difficult time with *mens rea*, which precisely involves a judgement of mental states where the

¹⁸⁸ See for example Joshua Knobe’s work on intention, morality and folk psychology. Knobe, J. “Intentional Action and Side Effects in Ordinary Language” *Analysis*, 2003, 63, 190-193.

defendant may be obstructive, confused, or even unable to express their own opinion.

§6.4 Palliative care, Euthanasia and the use of Morphine.

Relatively recent proposals to legalise assisted suicide under consideration by the UK parliament (e.g. the Marris Bill¹⁸⁹) have sought to introduce an exception for medical practitioners who provide lethal drugs to those who are terminally ill, when specific criteria are met. Double effect plays a role in this debate. It is used by both sides in order to justify their position, and it has been relevant to some of the most significant legal cases relating to the law on murder.

The use of morphine is at once an excellent and terrible example of double effect reasoning. Sadly, it is only excellent as a hypothetical or theoretical example. This is because the theoretical case of a life being shortened because of a dose of morphine prescribed in order to treat pain does not match up with current best medical practice. In fact, it has not matched up with best medical practice for 25 or so years¹⁹⁰. Instead of large doses depressing a patient's breathing, the correct titrations will tend to extend

¹⁸⁹ Assisted Dying (No. 2) Bill 2015-16

<http://www.publications.parliament.uk/pa/bills/cbill/2015-2016/0007/16007.pdf> (accessed January 2017).

¹⁹⁰ See for example Regnard, C. 'Double Effect is Leading a Double Life.' *BMJ*. 2007 Mar 3; 334(7591): 440.

<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1808133/> See also Morita T, Tsunoda J, Inoue S, Chihara S. Effects of high dose opioids and sedatives on survival in terminally ill cancer patients. *J Pain Symptom Manage* 2001;21:282-9 and Sykes, N. "The use of opioids and sedatives at the end of life" *The Lancet* Volume 4, No. 5, p312–318, May 2003

patient's lives as they derive health benefits from the calming effects of the drug¹⁹¹. So, the correct use of morphine is doubly beneficial in relaxing the patient and alleviating pain rather than subject to double effect reasoning due to harmful effects.

Furthermore, there may be unintended harmful consequences of the widespread use of the Morphine example as a case of DER. This application may perpetuate "the myth of the double effect of pain medication", where the impression is given that pain medication can lead to death, which it has been suggested, even among medics, can lead directly "to the under-treatment of suffering at the end of life."¹⁹² I would want to say, however, that rather than this kind of phenomenon being a reason to question DER, it is a cautionary tale that highlights a risks of doing applied philosophy, since the association between palliative medication and death might come up in other discussions unrelated to DER. Philosophical examples can be used in isolation from best practice (such as the prescribing practices in palliative care), and we must trust that they are not being used with the intention of causing suffering, and that the benefit of their use outweighs any harmful side effects that arise. So, we might deploy DER to permit the discussion of DER.

¹⁹¹ Sykes, N. "The use of opioids and sedatives at the end of life" *The Lancet* Volume 4, No. 5, p312–318, May 2003.

<http://www.thelancet.com/journals/lanonc/article/PIIS1470204503010799/abstract>

¹⁹² Fohr, S. "The Double Effect of Pain Medication: Separating Myth from Reality" *Journal of Palliative Medicine* (1998).

This being said about the morphine example being inaccurate and misleading in the palliative care context, there may still be extreme circumstances where the correct titrations of morphine cannot be calculated, and in these kinds of cases DER would come into play. However, the usefulness of the example is linked to its medical plausibility in normal palliative circumstances. The more the case looks like it is applicable only in extreme circumstances, the less likely it is to be useful for end of life policy and legal reasoning.

So, there are some important background considerations when using double effect in relation to end of life care. These do not undermine its plausibility, but do mean that the application of DER needs to be careful. Much ink has been spilt on DER and end of life care, and it will be helpful to consider the structure of this dialogue, in order to be precise about the claims being made by proponents of DER.

Some writers in favour of assisted suicide and euthanasia argue that administering pain relief that hastens death is already a form of 'indirect euthanasia'¹⁹³, and that the law should acknowledge this. Thus, they might advocate for DER, but as a form of euthanasia. It should be clear that this is a mistaken application of DER. It is hard to see how a coherent position on the intend/foresee distinction could be maintained here. If, following DER, actions that aim at the deaths of patients are impermissible on the basis of

¹⁹³ See for example Smith ML, Orlowski J, Radey C, Scofield G: A good death: is euthanasia the answer? *Cleve Clin J Med* 1992;59:99-109.

their intention, then deploying DER as a roundabout or indirect way of intentionally securing the death of patients ought also to be considered impermissible. The key differentiating position between a proponent of indirect euthanasia and DER (as outlined in this thesis) is in relation to the permissibility of intentionally killing someone.

The debate here does not turn on whether double effect is a good theory of the permissibility of causing harmful side effects. At the heart of this debate is the question of whether it is ever permissible to aim at someone's (or your own) death. This distinction between objections to killing and objections to double effect is important because the prohibition on killing is one of the starting points of the traditional approach to double effect. Wider objections to the prohibition on killing are not best (or at all) answered by double effect. Thus, while Allmark et. Al. argue that DER does not apply to end of life care, they do so on the basis that hastening death is not a bad outcome that needs justification¹⁹⁴. How one ought to assess the health benefits and burdens associated with death and interventions around the time of death is not only medically, but also philosophically difficult and controversial¹⁹⁵. So, far from undermining DER Allmark et. al.'s position fails to engage with those who are not committed to the view that hastened death is a benefit (or neutral) to terminally ill patients¹⁹⁶. Furthermore, a

¹⁹⁴ Allmark, Peter, Cobb, Mark, Liddle, B. Jane and Tod, Angela (2010). Is the Doctrine of Double Effect irrelevant in end-of-life decision making? *Nursing Philosophy*, 11, 170-177.

¹⁹⁵ On this topic see Barrie, S. "QALYs, euthanasia and the puzzle of death" *Journal of Medical Ethics* 41 (8):635-638 (2015).

¹⁹⁶ Nor do they consider the possibility of DER being useful for cases where benefits and burdens of hastened death are marginal or unclear.

proponent of DER might agree with Allmark that death can be a benefit, but still deny that death may be intended. If our intentions are relevant to permissibility in the way DER suggests, then intended death might still be impermissible even if foreseen death were to benefit the patient.

§6.5 A Difficult End of Life Case.

A recent and controversial example of DER in the law occurred in 2016 in the state of Victoria, Australia. In that state, physician assisted suicide is illegal, though there is precedent for DER to be invoked in end of life cases. A Victorian tribunal supported a doctor's agreeing to provide pentobarbitone (Nembutal) to a patient at some point in the future if the patient feels (at that later time) that his pain is unbearable and he wants to end his life. This was supported on the basis of double effect, and the argument that Dr Syme's primary purpose in promising the lethal drug was not the death of the patient, but psychological suffering that was alleviated by the patient's ability to control their death.

It is not at all clear that this is a proper use of DER. It is important to note at this stage that for our analysis, that the question of whether assisted suicide is or can be justified is beside the point. The question here is whether DER can be used, in the context of a prohibition on assisted suicide, to permit actions like those of Dr Syme, that facilitate assisted suicide, but that are (also) done for other purposes. Dr Syme wants to have his cake and eat it; using DER to operate in a way that is consistent with the law prohibiting

assisting suicide, while at the same time facilitating and promoting assisted suicide.

There are two strands to my alternative analysis of this case. Firstly, there is good reason to think that Dr Syme's actions fall under the first condition of DER, secondly that they fall under the intention condition.

In a jurisdiction in which assisted suicide is prohibited, it is perhaps too much of a stretch to think that promising or prescribing lethal medication is a good or neutral action, even if it carries some psychological benefit to the patient. If the doctor promises to provide the poison, he is facilitating, aiding and abetting the patient's suicide. The first condition does not specify anything in relation to the intention of the agent, so it would be possible for the legislator to take the view that such facilitation of an illegal activity is prohibited, and the law may indeed prohibit this. This would prevent further application of DER. A standard example of the first condition in action involves the scope of analysis, simply if the proposed action is wrongful, then its further effects and the agent's intention do not make it permissible.

It is also far from clear that the case passes the intention condition. Dr Syme's defence was that his primary reason for promising to provide the poison was palliative, rather than to bring about the death of the patient. However, we might ask whether it is credible that Dr Syme did not also intend to facilitate the death of the patient. It is possible for one and the

same plan to be done for more than one reason, being part of more than one plan. It is certainly plausible that Dr Syme both intends that his patient's fears are allayed, and that he be helped to kill himself when and if the time comes.

It might be objected that the doctor, in *promising* to provide poison, does not intend to provide the poison. If his promise is taken at face value, he does, however, have a conditional intention to assist suicide: if the patient determines to commit suicide then Dr Syme will provide the poison. DER is couched in terms of straight-forward intention, and there is no reason to think that this would not also apply to conditional intentions. On closer scrutiny many intentions are in fact conditional. To take two routine examples, I might intend to overtake a car on the motorway, but only settle on the exact speed and timing of my maneuver in response to other drivers' behavior, and I might settle on the route to my intended destination only once I have further information about traffic conditions etc. So, far from being a counter-example, due to DER appearing to permit the promise and plan of the doctor, this case is better understood as an example of an action prohibited by DER.

Much has been made of the difficulties in applying DER, but those advocating for the removal of DER from the law rarely consider whether it would be possible to capture the main thrust of DER e.g. in statute. Richard Huxtable has recommended just such a statutory provision that seems to me to deal with many of the hard cases, though forensic challenges will remain.

His formulation is that “where a responsible medical professional administers treatment

1. That is clearly designed solely to relieve pain, suffering and/or distress;
2. In accordance with responsible medical practice; and
3. With the intention to relieve pain, suffering and/or distress and *not* to kill the patient

He or she shall not be guilty of an offence.”¹⁹⁷

This is a clear and concise formulation that expresses the conditions of double effect. 1) and 2) together address proportionality, and 3) addresses both the intention and the means condition. There is some precedent for statements like 3) above. For example the Mental Capacity Act 2005¹⁹⁸ states that the person determining whether a treatment is in the best interests of a patient “must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.”¹⁹⁹

This kind of statement is not vague and inapplicable, plagued by being too complex to be applied safely²⁰⁰. It is a statement of the prohibition that references the plans and desires of the decision maker. Under this kind of

¹⁹⁷ Huxtable, R. “Get out of Jail Free? The Doctrine of Double Effect in English Law” *Palliative Medicine* 2004 18: 62-68.

¹⁹⁸ The Mental Capacity Act Department of Health (2005). London, HMSO.

¹⁹⁹ Ibid. Section 4, article 5.

²⁰⁰ See Foster et. Al. *The Double Effect Effect* (2011) p69.

formulation, the Victorian Doctor's case of promising looks very much less like a strange but legitimate use of DER, and more like it will be ruled out.

§6.6 Murder, DER and Recklessness.

So far in this thesis, when considering a prohibition on murder, we have looked at whether, under DER, the intention condition can navigate the question of permissibility. This condition functions as an exclusionary reason (see Ch4) – excluding particular intended ends or means. Our discussion of closeness has refined this to suggest that actions may be wrongful if they do not aim at death but aim at some closely related action. This is not because the action is in fact an intended death, but because there may be other prohibitions (such as against bodily invasion one knows to be lethal) that are pertinent to the case. These refinements of DER do not, however mean that all cases properly described as 'murder' are necessarily actions that are intentional killing, or close intentional actions that cause death. There may be other actions we want to class as 'murder'²⁰¹.

There is more than one way not to have a proscribed intention. If DER's conditions render an action impermissible on the basis of an intention, the way to resolve this would be not to act, or to choose to do something else, but this does not exhaust the ways in which one might not intend harmful effects. An agent may fail to have a relevant intention for morally

²⁰¹ See Anscombe, "Action, Intention, and Double Effect." Who takes just such a wide understanding of 'murder'.

blameworthy ways, as cases of recklessness. Here, the agent may be blameworthy for having foreseen morally important effects, or for having foreseen morally important effects, but without weighing them adequately. The agent may just not have cared about harmful foreseen effects.

Cases of recklessness or negligence do appear to be both blameworthy and impermissible, but in a way that is not obviously captured by DER. In these cases the agent is culpable for different sorts of omissions, and these might be a failure to attend to morally important effects of their action as in recklessness, or culpable failures in knowledge or understanding that lead to negligent actions.

Lord Goff, writing extrajudicially, considers a case where a bomber who destroys a passenger plane in order to collect insurance money has argued that the *mens rea*, the mental element of murder, ought to be expanded to include cases of reckless indifference to human life²⁰². It is worth noting at this point that the contents of the insurance contract is crucial. If the payout is only in the eventuality that one or more passengers die, then their deaths are intended as part of the bomber's plan (and the deaths are not 'merely' reckless). If, on the other hand, the insurance company in the example pays out just because the plane is destroyed, this is a case of recklessness. I will focus below on the latter case, where the insurance pays out if the plane is destroyed.

²⁰² Goff, R. "The mental element in the crime of murder" *Law Quarterly Review* 1988,104: 30-59 cited in McGee, "Intention, Foresight, and Ending Life."

The problem identified by McGee in his discussion of this example is that it is hard to distinguish between what an agent intends as an end or a means, but I suggest that this better understood, however, as a version of the problem of closeness. We know very well from the example that the agent did not intend the deaths of the passengers; he foresaw their deaths but only chose to destroy the plane. The question is whether this case is relevantly close killing those passengers.

To follow the line of thinking in my chapter on closeness, it would be a mistake to interpret the case as one where the agent's intentions actually included the death of the passengers. Due to facts about the circumstances, it might be *implausible* to believe that one could bomb the plane without choosing to kill the passengers (this might be practically inconceivable), however in this case the intentions of the agent are specified for us, and they do not include the death of the passengers, so it is odd (to say the least) to say that the agent both has and does not have the relevant intention. A more satisfactory move than engineering intention to include killing in this case would be to consider a closely allied prohibition – that of acting with lethal reckless indifference to human life, as Lord Goff argues.

His further point that this should be included in the definition of 'murder', and falling under the mental element of murder is an interesting one for the proponent of DER. We have seen that intentions can determine what kind an action belongs to, but if we are to interpret an intention to kill as providing

sufficient conditions for an attribution of murder, rather than necessary and sufficient conditions, there is room for us to interpret murder to include lethal negligence or recklessness. It may be objected that we cannot have it both ways. DER allows for lethal unintended side effects to be permissible in some circumstances, whereas we are here introducing a way for foreseen effects, such as those caused as side effects of otherwise good plans, to render an action impermissible, and not just impermissible, but impermissible on the basis of the very same prohibition against murder. This might introduce a problem for DER, that there is a kind of blind spot around reckless cases, where the agent avoids impermissible intention, but only through recklessness.

There are a number of ways out of this possible complication. On the one hand, we might say that the legal understanding of murder is artful, in that it needs to prohibit more than the central cases of intentional killing. It needs to do this for a number of reasons, including in relation to the law's forensic approach, which after the fact attempts to determine what is intended with imperfect evidence and potentially misleading testimonies. For this reason 'murder' could helpfully include recklessness just in the way the law understands intention is a "legal fiction", where evidence of foresight counts as evidence of intent.

Alongside this broad use of the concept of 'murder' in the law in order to address Lord Goff's closeness type-challenge to double effect, we may be able to deploy the fourth condition of DER to account for reckless cases. The

fourth condition, as we saw in Chapter 1, ought to be interpreted in two ways, firstly in relation to simple proportionality, that the good ought to outweigh the bad, but it also ought to be understood as specifying that the plan under consideration ought to be the least harmful way of achieving one's ends (these aspects are often brought together in formulations that require there to be a "proportionate reason" to cause the bad effect)²⁰³. So, the thinking might go, someone who is destroying a passenger plane in order to collect insurance money does not have a proportionate reason to destroy the plane, because there are many lives aboard. Note that the condition is not that the agent takes there to be a proportionate reason, and we can say that the fourth condition renders the bomber's action impermissible, whether or not the bomber is misguided or callous enough not to regard the passengers as a reason that counts against destroying the plane.

²⁰³ See e.g. Daniel P. Sulmasy, "'Reinventing' the Rule of Double Effect," in *The Oxford Handbook of Bioethics*, 2009, 1–41, who considers the proportionality condition to be 'due diligence', as opposed to weighing overall good and bad outcomes.

Chapter 7 Concluding Remarks

In broad terms, there have been two projects in this thesis. A number of the chapters undertake interpretive work on double effect, in particular the chapters on the history of DER, on closeness, and on DER and the law, and in these the main thrust has been that properly interpreted, DER is not so vulnerable to the criticisms often levelled against it. The key chapters 3 and 4 on the philosophy of action and the moral significance of what is intended attempt to draw insights from debates in the philosophy of action, and bring them to bear on double effect reasoning. There has been very little attention to the relationship between positions in the philosophy of action and DER, in spite of the amount of ink spilt on both of those areas. My conclusion, that holding different positions in the philosophy of action will have a profound effect on how one understands double effect and the normative evaluation of actions, might not be revolutionary, but is brought into sharp focus in these chapters.

That is the broad outline of the thesis, and in what follows I will outline the main points and conclusions of each chapter, in order to draw out the points of argument and connections between chapters. It should be clear at this point that the thesis favours DER and the moral relevance or significance of intentions in action. This is not to say all of the challenges to interpreting DER can be overcome, nor that DER provides a fool-proof moral heuristic for good decision-making. DER, if it does indeed reflect important insights about the ethics of action, works at a nexus between disciplines or fields of enquiry; normative ethics and the philosophy of action have been

considered in this thesis, but others are also highly relevant, including moral psychology, self-determination and free will. This makes it a particularly difficult topic that has implications in a number of different theoretical directions. DER has wide application, across healthcare, warfare and the law (all of which considered here to some degree), and even across all fields of human action (and inaction), including business, politics and everyday life. DER has a long history, and in Chapter 2 I argue that DER type reasoning can be found in St Augustine, but not as far back as Aristotle, and in so doing, I address some criticisms of DER that emerge from readings of Aristotle, St Thomas Aquinas and the Catholic intellectual tradition. The result, combined with introductory remarks in Chapter 1, is a more clearly defined sense of the role and scope of DER, which ties it to particular moral prohibitions, and is relatively modest; not making claims about the permissibility of any and all cases of causing death, rather its reasoning applies to whether causing e.g. death as a side effect should be considered murder.

The third chapter highlights two schools of thought within the philosophy of action that I argue result in interestingly different approaches when applied to DER. Of particular interest is the question of whether intention formation is an action, or whether it is the (passive, non-voluntary) cause of action. I argue that on a Davidsonian account of action (as caused in the right kind of way by beliefs and desires), provides a theoretical background that supports criticism of DER on the grounds that intention is of secondary or merely derivative importance. This kind of objection has been moved by Judith Jarvis Thomson and T M Scanlon, among others. If intention is understood

(on the other hand) as non-voluntary, but also an action and up-to-us, then this a particular kind of objection to DER loses some of its force. The chapter introduces and considers this in some detail, however I contend more broadly *pace* Warren Quinn that different theories of intention and action have significant effects on the way DER is understood, and that this is worthy of further study.

In Chapter 4 I consider the moral significance of what is intended in more detail. I argue that DER's intention condition cannot be based on the predictive significance of intention. It is more plausible to ground a fundamental moral significance of intention in meaning, that is, the meaning of what an agent chooses to do. TM Scanlon's argument against DER, based on a distinction between the deliberative and critical significance of intention, is not robust, even when supported by Kavka's Toxin Puzzle, since I argue we can take intentions into account in deliberation even if we cannot choose intentions on the basis of their desirability. There are clear and mutually supportive links here with the arguments set out in chapter three. Chapter 5 considers another serious objection to DER, the problem of closeness. If particular intentions can be morally significant, an agent might merely intend something extremely 'close' to the prescribed action. The action is so close that we want to consider it morally equivalent, but it is not close enough to count as involving the same intention. A stock example is the terror bomber who (implausibly but conceivably) only intends to make his victims appear to be dead. After considering a few false starts, I settle on the need to acknowledge that, as suggested in Chapter 2, DER has a modest scope, related to particular prohibitions. Even if the implausible terror

bomber had only wanted to make his victims appear dead, and so is not strictly speaking guilty of intending their death, he makes them appear dead by intending grievous bodily harm to them, which we might also think is prohibited. So, we have close prohibitions rather than a difficulty for intention.

The final chapter takes DER, as defended in previous chapters, and considers some thorny problems of application in relation to the law. DER has what might be called a poor track record in legal thinking, while at the same time appearing to lie behind a number of legal distinctions: e.g. in relation to *mens rea*, exculpatory factors, treason, tort law, and (as considered in detail in this chapter), a distinction between euthanasia or assisted suicide and palliative care.

In order to consider DER as developed in previous chapters in relation to the law, some reflection on applying normative reasoning in legal contexts is needed, and I undertake this by way of reflection on case law and a trend among legal scholars to dismiss DER as too difficult to apply reliably. These challenges have parallels in the problem of closeness, which was addressed in Chapter 5, and which I draw upon here (see e.g. page 145 and p156), and the argument relies on clarifications made in Chapters 1 and 2. I close the chapter with a consideration of recklessness and negligence, which I suggest are under-appreciated in the DER literature. This consideration supports and reinforces moves made in Chapters 2 and 5, where I argue against reading DER as providing an all-things-considered judgement of permissibility. Rather, it is a coherent and important approach/guide as to whether an action is permissible in respect of a particular moral prohibition.

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